DOCKET

SHOW PROCEEDINGS AND ORDERS DATE: [02/28/89]

CASE NBR: [88100975] CFX STATUS: [ ]
SHORT TITLE: [Dudley, Robert]
VERSUS [Stubbs, John] DATE DOCKETED: [112288]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Oct 28 1988		Application (A88-349) to extend the time to file a petition for a writ of certiorari from November 6, 1988 to November 22, 1988, submitted to Justice Marshall.
Nov 1 1988		Application (A88-349) granted by Justice Marshall extending the time to file until November 22, 1988.
Nov 22 1988		Petition for writ of certiorari filed.
Dec 27 1988		Brief of respondent John Stubbs in opposition filed.
Dec 27 1988		Motion of respondent for leave to proceed in forma pauperis filed.
Jan 4 1989		DISTRIBUTED. January 19, 1989
Feb 6 1989		REDISTRIBUTED. February 17, 1989
Feb 21 1989		Motion of respondent for leave to proceed in forma pauperis GRANTED.
Feb 21 1989		Petition DENIED. Dissenting opinion by Justice O'Connor with whom The Chief Justice and Justice Kennedy join.

Last page of docket

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Feb 21 1989		Petition DENIED. Dissenting opinion by Justice O'Connor with whom The Chief Justice and Justice Kennedy join. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

88-975

No. 88-

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT DUDLEY,

Petitioner,

—against—

JOHN STUBBS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioner
120 Broadway
New York, New York 10271
(212) 341-2604

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

BARBARA B. BUTLER*
FREDERIC L. LIEBERMAN
Assistant Attorneys General

Of Counsel

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether this Court's analysis in *Whitley v. Albers*, 475 U.S. 312 (1986), requires that, where a prison inmate claims that a correction officer failed to protect him from attack by a gang of other inmates during a disturbance, the officer's actions be assessed against *Whitley*'s heightened standard of "malicious and sadistic" conduct rather than the lesser "deliberate indifference" standard?

2. If *Whitley*'s heightened standard is inapplicable, are obduracy and wantonness nonetheless required elements of an Eighth Amendment claim assessed under the "deliberate indifference" standard?

3. Given the plain language of Rule 15(c), *Fed. R. Civ. P.*, requiring that an added party "[receive] such notice . . . that the party will not be prejudiced" and "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party", is relation back permissible where the only notice was given to co-defendants who share the same employer and attorney as the added defendant; the amending party was unable to determine, not mistaken about, the added defendant's identity; and the added defendant had no knowledge that plaintiff intended to name him as a defendant?

4. Whether, in light of the embryonic stage of the law in 1977 regarding a correction officer's duty to protect an inmate from other inmates, an officer who refused to permit an inmate being chased by twenty or more inmates to enter a secure area of the prison is entitled to qualified immunity?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-

ROBERT DUDLEY,

Petitioner,

—against—

JOHN STUBBS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Robert Dudley, by the Attorney General of the State of New York, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this action.

OPINIONS BELOW

The opinion of the court of appeals, reversing the district court's judgment in favor of petitioner notwithstanding the verdict in favor of respondent, and directing entry of judgment upon that verdict, is reported as *Stubbs v. Dudley*, 849 F.2d 83 (2d Cir. 1988). The opinion of the district court, granting petitioner's motion for judgment notwithstanding the verdict and dismissing the complaint in its entirety, is unreported. These opinions are reproduced at 1a-9a and 1b-10b.

The district court rendered two other opinions concerning petitioner. An opinion rendered on May 4, 1984 granted

respondent's motion to add petitioner as a defendant. An opinion dated May 3, 1985 denied petitioner's motion for summary judgment with respect to the claim that he failed to protect respondent during the course of an incident which took place at Arthur Kill Correctional Facility ("Arthur Kill") on February 4, 1977, but granted the motion with respect to claims against him as a witness at respondent's disciplinary hearing. These unreported opinions are reproduced at 1c-4c and 1d-7d.

Other opinions rendered by the district court which do not involve petitioner include an opinion rendered on March 23, 1984, granting summary judgment to defendant Robert McClay; an opinion rendered on March 22, 1985, granting summary judgment to defendant Robert Hoke; an opinion rendered on April 26, 1985, granting summary judgment to defendants Theopolis Clements and Dominic Rufino; and an opinion rendered June 14, 1985, granting defendant Martin Ranzer's motion to dismiss. None of these opinions are reported.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 13, 1988. The order of that court denying a timely petition for rehearing was entered on August 8, 1988. This petition is filed within the time permitted for filing. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

United States Constitution

Amendment [VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Federal Rules of Civil Procedure

Rule 15. Amended and Supplemental Pleadings

(c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

* * *

STATEMENT OF THE CASE

Respondent commenced the action below in January 1980 pursuant to 42 U.S.C. § 1983, alleging that he was deprived of certain of his rights under the United States Constitution as the result of an incident in which he was involved on February 4, 1977 at Arthur Kill. The gist of respondent's claims was that certain correction officers had failed to protect him during a fight he had with other inmates.

The February 4, 1977 Incident

On February 4, 1977, Arthur Kill was the scene of a facility-wide sit-down strike by the inmates (Supplemental Appendix submitted to the Court of Appeals ("SA") at 143-44), and it was not known whether there would be further incidents. *Id.* That evening, Stubbs left his housing unit to make a telephone call. He went from his "C" Block housing unit to "C" Corridor where he was confronted by twenty, thirty or even more inmates. SA 93-94, 105. He then ran, chased by the other

inmates, to the Main Corridor. Off the Main Corridor is a corridor to the Administration Building ("Administration Corridor"). Stubbs testified that there were two correction officers at the door to the Administration Corridor ("Administration door"), one of whom was Dudley. SA 92.

Accepting, as did the court of appeals, that Stubbs' first contact with Dudley was when Stubbs ran into the Main Corridor, all Dudley would have seen was twenty or more inmates rampaging down the hallway, some with knives and sticks, some throwing garbage cans and table legs through the hallway. SA 96-98, 112, 117, 138, 210-21, 223, 226, 237-39, 241-43, 245, 249-50. It was conceivable that the inmates were intent on taking over the facility after the sit-down strike which had taken place that day, or creating a diversion for some other planned activity in another part of the facility. SA 196-98. When he reached the Main Corridor, Stubbs turned to his right and ran 100 feet toward the Administration door. SA 92, 94-99, 101-02, 107-09, 110-13, 216, 218, 224-28. The officers ran and got the key to the Administration Building, opened the door and went through. SA 96-97. Stubbs ran to the door and tried to open it (SA 93, 101-02, 116A), but it was locked. Stubbs said "Help" and "Open the door, open the door." SA 114-15, 101-02. When he was trying to open the door, the officers "were standing right there." SA 115-16.

The only testimony presented concerning how close the other inmates were to Stubbs, and, therefore, what opportunity Dudley had to protect Stubbs by letting him through the door, was Stubbs' own testimony that when he was trying to open the door, the other inmates "were on" him (SA 116A); Officer Caminetti's testimony that, within seconds of reaching the door, several inmates were trying to hit Stubbs (SA 459, 492); and Dudley's testimony that the inmates caught up to Stubbs at the door (SA 160-61).

From the Administration door, Stubbs ran down the Main Corridor to the telephone room located in the "B" Block Control Area where other inmates attacked and injured Stubbs. Stubbs was hospitalized for five days.

Dudley was not carrying a firearm, a baton or a walkie-talkie during the incident. SA 170-72. He testified that he did not attempt to open the Administration door because he never had the chance to, but would not have done so in any event, because the arsenal, the offices of the Superintendent and the Deputy Superintendents and prison Security are located off the Administration Corridor. SA 173, 175. The prison hospital is also reached through the Administration corridor. "[T]here is no way you are to allow inmates to go up into that area, especially in that type of situation." SA 173.

In addition, Gary Filion, the Director of the division of the Department of Correctional Services (the "Department") which handles emergency situations such as riots and disturbances (SA 195), testified that, under proper prison security practices, when an incident occurs, a correction officer should be extremely cautious about intervening too soon. Officers should "try to make an assessment of what is actually happening there at that time" and "with the best ability that you can, try to contain and isolate the situation." SA 196-97. He explained that an incident may be just a diversionary tactic, and that premature intervention could cause it to become something more serious than it otherwise would be. SA 196.

Whether or not an officer should engage in a physical confrontation depends on the severity of the problem—is it "one inmate against one inmate, or are we talking about ten inmates, twenty inmates, one officer, two officers". SA 197. There is a concern that officers may become hostages. "[I]f there is a confrontation, and there are limited number of staff available to try to minimize the situation, and there is a number of inmates, either the officer will be injured or taken hostage, and once he's hostage, then the situation is escalated considerably." SA 198, 202-03.

According to Filion, who was familiar with the area where the incident took place, the most appropriate thing for one or two correction officers, standing by the administration door, to do if they saw armed inmates chasing another inmate, would be to secure themselves behind the door and wait for additional

help because the Administration corridor leads to the Administration building and, if inmates got into the Administration building, "they would own the entire jail." SA 200. "[I]f there [are] any doors available, any way you can isolate or contain it, one officer, two officers or three officers try to contain that incident, try to close it off, so that a major disturbance, which I would consider that being at that point, doesn't turn into a full-scale riot." SA 198-99, 201, 204.

The trial court concluded that "[f]rom Stubbs' testimony it is clear that: (1) there was a serious threat to prison security at the time Stubbs sought Dudley's protection; (2) Dudley acted without ill will or malice; and (3) prior to the attack upon Stubbs, Dudley had no knowledge of either a threat to Stubb's life or the possibility that Stubbs would be attacked." 6b-7b.

Stubbs' Administrative and State Court Proceedings

After the February 4, 1977 incident, Stubbs had a disciplinary hearing and a rehearing, based on his involvement in the fight and his possession of a knife. Dudley was referred to or named in numerous documents generated during these proceedings, relevant portions of which are reproduced at 1e-11e. Included among those documents are an Inmate Misbehavior Report, signed by Dudley (SA 1) (1e); a transcript of the February 11, 1977 disciplinary hearing in which Dudley is referred to and Stubbs acknowledges that Dudley was the charging officer (SA 4, 21) (2e); a record sheet of that hearing, which lists Dudley as a witness (SA 24) (3e); a transcript of the rehearing held on July 28 and 29, 1977, in which Dudley is referred to, in Stubbs' presence, as an officer who testified that Stubbs had a knife during the incident (SA 44-45) (4e-10e); a record sheet of the proceeding, listing Dudley as a witness (SA 47) (11e); and a Superintendent's Proceeding report, listing Dudley as the reporting officer (SA 50) (11e). In addition, Dudley was a witness at the hearing and his name appears repeatedly on nine of the twenty-one pages of the transcript. SA 26-46.

In April 1977, through counsel, Stubbs commenced a proceeding in the New York State Supreme Court, challenging the

determination rendered after the first disciplinary proceeding. All six of the documents generated during the first and second Superintendent's Proceedings were a part of the record in Stubbs' state court proceeding. SA 268. After the Supreme Court dismissed the proceeding, Stubbs commenced an appeal which was never perfected. It was not until almost two years later, by letter dated September 25, 1979, that Stubbs asked his attorney to forward to him his file. SA 51. This letter was attached to an affidavit submitted by Stubbs' attorney in this action.

The Proceedings Below

Stubbs commenced this action in the United States District Court for the Northern District of New York in mid-January, 1980. He named as defendants Arthur Kill Superintendent Robert McClay, Correction Officers Lewis and Clemmons, and an unnamed officer identified only as Correction Officer "A". Robert Dudley was not named as a defendant. Lewis and Clemmons were served on January 22, 1980 and Superintendent McClay on February 5, 1981. By order dated February 28, 1980, the action was transferred to the Eastern District of New York. On October 5, 1983, Stubbs filed an amended complaint in which he substituted "John Doe" for Correction Officer "A". As in the original complaint, there were no references whatsoever to Dudley.

In December, 1983, Superintendent McClay moved to dismiss the complaint. On February 6, 1984, Stubbs filed a cross motion to amend his complaint to add Dudley as a defendant, along with Deputy Superintendent Robert A. Hoke and Correction Officers Dominic Rufino and Martin Ranzer. In support of the application, Stubbs' counsel stated that, by letter dated December 5, 1983, he had received documentation from defendants' attorney identifying additional defendants, including Dudley, who had participated in the first Superintendent's Proceeding as investigating officers, accusers and witnesses. All of these documents had been generated during the Superintendent's Proceedings (SA 272), and were in the record in Stubbs' state court proceedings. Nevertheless, Stubbs claimed to have

had no knowledge or any way of obtaining knowledge of the identity of these individuals, including Dudley, prior to the receipt of these documents in December 1983. SA 58-59. On February 17, 1984, the District Court directed defendants to provided it with additional information concerning Stubbs' state court proceedings. On February 29, 1984, the entire record of the state court proceedings was filed with the court. Included were the six documents generated during the disciplinary proceedings which named Dudley. SA 49.

On May 4, 1984, based on Stubbs' proffer, the Court granted his motion to add Dudley, Hoke, Rufino and Ranzer as defendants.[1] The court held that all of the requirements of *Fed. R. Civ. P.* 15(c) for relation back had been met. Specifically, the court stated that the conduct of the defendants to be added was sufficiently linked to the occurrences outlined in the original complaint; that constructive notice could be imputed because the defendants would share the same attorney and were members of the same organization; that the new defendants would thus not be prejudiced; and, finally, that Stubbs could not reasonably have ascertained the identities of the defendants before he received the December 5, 1983 letter. SA 65-66.

Dudley was then served with a summons and a copy of the Amended Amended Complaint on October 22, 1984. SA 69. Dudley answered the complaint, denying the allegations and asserting good faith immunity and the statute of limitations as defenses.

Subsequently, an investigation was conducted by the Attorney General's office concerning the allegations about the officer who allegedly locked the gate. While certain information and witnesses were available, other information and witnesses were not. Arthur Kill was unable to locate either the duty roster or the watch commander's logs for February 4, 1977. Also, a correction sergeant who had been involved had died. Finally, none of the inmates listed in the central office records as having

1 All the complaints, except those against Lewis and Dudley, were subsequently dismissed by the district court.

possibly been in the area were still incarcerated and an investigation failed to locate them. SA 272.

Dudley then moved for summary judgment. In his affidavit in support of the motion, Dudley stated that he was not "John Doe". SA 69-70. Rather, he and Ranzer had tried unsuccessfully to close the "C" Corridor doors and then followed Stubbs to the Main Corridor where the two had stopped to assist an officer who was on the floor in front of the Administration door. SA 70-71. Dudley also stated that he had acted in good faith, believing that it was his duty to try to contain the incident. SA 71. He also argued that he was entitled to qualified immunity since, given the crisis situation, it was reasonable for him to believe that he was acting lawfully. Finally, Dudley contended that he had acted properly in being a witness at the disciplinary hearing. In an opinion rendered May 3, 1985, the court denied the motion with respect to the claim that Dudley failed to protect Stubbs during the incident. The court held that whether or not Dudley was Correction Officer "A" was a material fact in dispute which foreclosed the granting of summary judgment on the merits or on the ground of qualified immunity. SA 84.

The trial took place on January 27, 28 and 29, 1987. After the district court rejected Dudley's proposed charge setting forth the heightened "malicious and sadistic" standard of *Whitley v. Albers*, 475 U.S. 312 (1986), (SA 263), and delivered instead a deliberate indifference charge, the jury returned a verdict in favor of Stubbs against Dudley in the amount of $26,000.00. Having decided that the question of Dudley's statute of limitations defense was a legal question (SA 137), the court heard argument on the defense on January 30, 1987. At that time, the court held that Judge Bramwell's ruling allowing the relation back of the complaint was law of the case. SA 260A. Nevertheless, the court later instructed Dudley to include the statute of limitations argument on his motion for judgment n.o.v. SA 268.

The District Court's Decision

In a memorandum decision dated September 3, 1987, the district court granted Dudley's motion for judgment n.o.v. and dismissed the complaint in its entirety. 1b-10b. In reaching its conclusion, the court accepted Stubbs' testimony that Dudley was the officer at the Administration door. Citing *Whitley*, *supra*, *Daniels v. Williams*, 474 U.S. 327 (1986), and *Davidson v. Cannon*, 474 U.S. 344 (1986), the court held that the standard by which Dudley's conduct should be assessed is deliberate indifference, characterized by obduracy and wantonness. 4b.

The court recognized that there is a legitimate and protected interest in maintaining prison security which may, at times, take precedence over the individual rights of inmates 4b-5b, and cited to this Court's holding in *Whitley*, 475 U.S. at 320, that "a correction officer acting in the midst of a prison disturbance 'must take into account the very real threats the unrest presents to inmates and prison officials alike.' . . . Accordingly, 'officials cannot realistically be expected to consider every contingency or minimize every risk.' . . . Nor are correction officers expected to protect an inmate from other inmates without regard for prison security or their own personal safety." 6b. Applying these standards to the facts, the court held that "it is evident that while the jury could have found that Dudley was unreasonable or negligent in failing to protect Stubbs, Dudley's omission cannot reasonably lead to an inference of deliberate indifference." *Id.* With respect to defendant's arguments as to the statute of limitations and qualified immunity, the court stated that they had been previously rejected and, upon reconsideration, reaffirmed the prior rulings. 9b.

The Court of Appeals' Decision

The court of appeals reversed the district court judgment on the grounds that what it characterized as the *Whitley* standard of "obduracy and wantonness" did not apply to the circumstances of this case, and that a showing of malice was not required. 7a-8a. The court of appeals stated that the *Whitley* standard takes "into account 'competing institutional concerns' where the officials are 'making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance.' 106 S. Ct. at 1084." 8a. The court found that "[i]n the present case the condition creating the 'prison disturbance' was the Stubbs incident itself: twenty or more angry prisoners wanted to hurt one prisoner." *Id.* (footnote omitted). The court then found that the only competing institutional concern here was whether Dudley, by aiding Stubbs, might plausibly put prison security, or his own safety, at risk and concluded that the lesser "deliberate indifference" standard applied. *Id.* According to the court, the evidence supported a conclusion that Dudley had acted with deliberate indifference. 8a-9a.

REASONS FOR GRANTING THE PETITION

A. The Decision of the Court of Appeals Conflicts With the Decisions of Other Courts of Appeals Concerning 1) the Circumstances Under Which to Apply the Heightened Standard for Liability Under the Eighth Amendment Enunciated by This Court in *Whitley v. Albers* and 2) whether Obduracy and Wantonness are Necessary Elements of any Eighth Amendment Claim.

(1)

More than a decade ago this Court held that the "unnecessary and wanton infliction of pain" was proscribed by the Eighth Amendment, *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), and "that deliberate indifference to serious medical needs of prisoners" constitutes such unnecessary and wanton infliction of pain. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). *See also Ingraham v. Wright*, 430 U.S. 651, 669-70 (1977). Ten years later, in *Whitley*, 475 U.S. at 320, a case involving the use of force during a prison riot, this Court expressed its concern that, since prison officials have responsibility for the safety of both staff and inmates, "a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." There-

fore, the Court ruled that where security measures are undertaken to resolve "a disturbance, such as occurred in" *Whitley*, the question whether there had been an Eighth Amendment violation turns on whether the response was taken "maliciously and sadistically for the very purpose of causing harm." *Id.* at 320-21.

This case presents the question whether the phrase "a disturbance, such as occurred in" *Whitley* encompasses only full-blown riots or extends as well to other incidents presenting immediate risks to staff and inmates which require that security measures be undertaken in haste. The courts of appeals have reached conflicting results in addressing this question.

Petitioner submits that the court of appeals' holding that the heightened *Whitley* standard is applicable only to situations which involve the use of force during a full-blown riot is based on a fundamental misunderstanding of *Whitley* and the concern which this Court addressed in establishing the heightened standard. Rather, consistent with the Court's analysis, the heightened standard enunciated in *Whitley* applies, at a minimum, to situations where the safety of other prisoners or staff is at risk and in which decisions have to be made quickly. Indeed, here the security measures were necessarily undertaken in far greater haste than in *Whitley* where the disturbance took place over a two hour period. To date, three circuits have recognized that the conduct proscribed by the heightened *Whitley* standard is not limited to situations involving the use of force during a full-blown riot.[2] In addition, there is a variety of opinion among the circuits as to which circumstances warrant application of the heightened standard.

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2 Insofar as the holding of the court of appeals that the heightened *Whitley* standard is inapplicable can be read as relying on the fact that this was not a full fledged riot, the holding is in conflict with a prior holding of that court. In *Corselli v. Coughlin*, 842 F.2d 23 (2d Cir. 1988), an inmate involved in a confrontation with a correction officer was restrained. The court held that while *Whitley* was factually distinguishable, since it involved a full-scale prison riot, the *Whitley* test was nevertheless applicable. *Id.* at 26.

Specifically, the Eighth and Eleventh Circuits have applied the heightened *Whitley* standard in situations which did not involve either the use of force or a full-blown riot but rather involved prison security measures applied under circumstances warranting immediate action. *Holloway v. Lockhart*, 813 F.2d 874, 879 (8th Cir. 1987) (three inmates refused to leave a dayroom until medical attention had been provided for one of them and the guards gassed the room for ten or fifteen minutes, causing injury to inmates in nearby cells); *Ort v. White*, 813 F.2d 318, 323-25 (11th Cir. 1987) (on several occasions, an officer would not allow an inmate assigned to the officer's farm squad to drink any water until he began to perform his assigned tasks); *Brown v. Smith*, 813 F.2d 1187 (11th Cir. 1987) (placing inmate into his cell when he refused to enter).

The Fifth Circuit has applied the standard in a number of cases where, although there was a use of force, the circumstances did not involve a riot. *Hines v. Boothe*, 841 F.2d 623, 624 (5th Cir. 1988) (an officer shoved an inmate against a brick wall several times causing great pain); *Anthony v. Lynaugh*, 833 F.2d 1007 (5th Cir. 1987) (table) (inmate claimed that he had been pushed, kicked and beaten to the ground by guards when he was found in a hallway during a time he should have been in his cell) (opinion attached as an appendix to *Hines*, 841 F.2d at 625); *James v. Alfred*, 835 F.2d 605, 607 (5th Cir.) (inmate alleged that he had been physically assaulted by jailors), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1599 (1988). The Fifth Circuit has also applied the heightened *Whitley* standard to claims of excessive use of force against pre-trial detainees. *Stevens v. Corbell*, 832 F.2d 884 (5th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 2018 (1988).

In addition, the Fourth Circuit, which has not had occasion to specifically apply the heightened standard in an eighth amendment case, has indicated that application of the standard is not so prescribed. *LaFaut v. Smith*, 834 F.2d 389, 391-92 (4th Cir. 1987) (heightened standard not applicable where there were no competing, equally important governmental responsibilities). Moreover, it has applied the heightened *Whitley* standard to claims of excessive use of force against pre-trial detainees on

the grounds that "[a]lthough *Whitley* dealt with an excessive force claim arising under the eighth amendment, we perceive no meaningful distinction between the scope of the jury's inquiry in that situation and in a case involving an allegation of excessive force violating the fifth amendment rights of pre-trial detainees." *Justice v. Dennis*, 834 F.2d 380, 383 n.4 (4th Cir. 1987).

Other circuits that have held, or indicated, that the heightened standard is limited to situations involving use of force during a full-blown riot. The Ninth Circuit, which also has not had occasion to specifically apply the heightened standard, has indicated that the standard applies only where there is an ongoing prison disturbance, *Vaughan v. Ricketts*, 859 F.2d 736, 1988 Westlaw 105740 (9th Cir. 1988) (the circumstances, while involving a threat to security, did not constitute an ongoing prison disturbance); *Berg v. Kincheloe*, 794 F.2d 457, 460 (9th Cir. 1986) (applying deliberate indifference standard to a failure to protect claim, the circuit noted that heightened *Whitley* standard applies when prison officials respond to an outbreak of violence). At the same time, however, the Ninth Circuit has held the heightened *Whitley* standard applies less restrictively to a prison security measure. *Christianson v. Kincheloe*, 857 F.2d 1477 (9th Cir. 1988) (table) (text in Westlaw) (an inmate was removed from his cell and handcuffed after he refused to cooperate with a search of his cell). Conversely, the Tenth Circuit has indicated that the heightened standard may be limited to the context of prison rioting. *Harris v. Maynard*, 843 F.2d 414, 416 n.1 (10th Cir. 1988) (applying deliberate indifference standard where an inmate was murdered after his mother had repeatedly informed the prison officials of the inmate's need for protection and a "separation order" had been issued but not effectuated for approximately six weeks).

In sum, this Court has established a heightened standard of review for decisions made in haste and under pressure by corrections officials in situations where there are competing interests. Here, the Second Circuit recognized that there were competing interests of prison security and the officers' safety, and that the decision also was made in haste, but nevertheless

limited the use of the heightened standard to situations involving the use of force during a full-blown riot. That conclusion directly conflicts with decisions of the Fourth, Fifth, Eighth and Eleventh Circuits. This conflict between the Second and other circuits, as well as the variety of opinion among the circuits as to when the heightened *Whitley* standard applies, warrants plenary consideration by this Court.

(2)

In addition, the court of appeals, in its decision, stated that the heightened standard announced by this Court in *Whitley* is "[a] standard of 'obduracy and wantonness' ". 7a-8a. The "deliberate indifference" standard which the court of appeals found applicable is, therefore, in its view, some lesser standard which does not require a showing of "obduracy and wantonness". 8a.[3] Petitioner submits that this holding conflicts with this Court's holding in *Whitley* that

> [i]t is obduracy and wantonness, not inadvertance or error in good faith, that characterizes conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

Whitley, 475 U.S. at 319. The Second Circuit's view that "obduracy and wantonness" are elements only of the heightened standard is contrary to the holdings of eight circuits which have recognized that it is "wantonness" that characterizes all conduct prohibited by the Eighth Amendment. *Dell Fargo v. City of San Juan Bautista*, 857 F.2d 638 (9th Cir 1988); *McGhee v. Foltz*, 852 F.2d 876, 881 (6th Cir. 1988); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir.), *cert. denied*, ____ U.S. ____, 109 S. Ct. 68 (1988); *Blankenship v. Meachum*, 840 F.2d 741, 742 (10th Cir. 1988); *Foulds v. Corley*, 833 F.2d 52 (5th Cir. 1987); *Cody v. Hillard*, 830 F.2d 912, 913 (8th

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3 If certiorari is granted, petitioner reserves the right to argue that the district court properly granted the judgment n.o.v. under a lesser "deliberate indifference" standard.

Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1078 (1988); *Ort*, 813 F.2d at 322; *see Campbell v. Greer*, 831 F.2d 700, 702 (7th Cir. 1987) ("deliberate indifference" is "conduct which intentionally or deliberately or recklessly ignores any person's constitutional rights").

The only circuit, other than the Second Circuit, which has suggested that "wantonness" is a characteristic only of the heightened standard is the Fourth Circuit. *Pressly v. Hutto*, 816 F.2d 977, 979 (4th Cir. 1987), *appeal after remand*, ____ F.2d ____, 1988 Westlaw 105431 (1988). After *Pressly*, however, the Fourth Circuit explicitly recognized that it is "obduracy and wantonness" that characterize the conduct prohibited by the eighth amendment. *LaFaut*, 834 F.2d at 391; *Ruefly v. Landon*, 825 F.2d 792, 793 (4th Cir. 1987). There is, then, a conflict among the circuits as to what conduct is proscribed even when the heightened *Whitley* standard does not apply. This Court should resolve the conflict.

B. Certiorari Should Be Granted to Resolve a Conflict Between the Second Circuit and Other Courts of Appeals Concerning the Construction of the Relation Back Doctrine under *Fed. R. Civ. P.* 15(c).

The court of appeals, by upholding without explanation the district court's order permitting respondent to add petitioner as a defendant more than seven years after the incident at issue, allowed the relation back of the amended complaint based on the conclusion that a plaintiff's inability to determine the identity of a defendant is the equivalent under *Fed. R. Civ. P.* Rule 15(c) of a mistake about that identity; and, further, that, as a matter of law, the requirement that the additional party know within the limitations period that, but for a mistake, he would have been a defendant, is satisfied by imputing such knowledge from a timely served defendant who is represented by the same attorney and has worked or works for the same employer. Petitioner submits that this construction of Rule 15(c) is contrary to the plain language of the rule and to this Court's holding in *Schiavone v. Fortune*, 477 U.S. 21 (1986), and is in conflict with decisions of a number of other courts of appeals.

The question whether the "known mistake" requirement of Rule 15(c) is satisfied in the absence of a claim that plaintiff was mistaken about the identity of the subsequently named defendant and that the subsequently named defendant knew of that "mistake" has never been resolved by this Court, and there is a conflict among the courts of appeals as to the scope of these requirements. Additionally, this Court has not decided the question whether Rule 15(c)'s requirement that the defendant to be added receive "such notice . . . that the party will not be prejudiced" is satisfied by imputing notice to the subsequently named defendant through an attorney shared with the original defendants or the common employer of the defendants. *Cf. Schiavone*, 477 U.S. at 28-29 (leaving open question whether an "identity-of-interest" between defendants permits imputation of notice).

A plaintiff may, of course, amend a complaint to add an additional claim arising out of the same transaction, event or occurrence and, in general, that amendment will relate back to the date of the original pleading. *Fed. R. Civ. P.* Rule 15(c). However, where an amendment "chang[es] the party against whom a claim is asserted" and the amended complaint is served on the added defendant after the expiration of the statute of limitations, relation back will be permitted only if:

> . . . within the period provided by law for commencing an action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Rule 15(c) proscribes an amended pleading unless all four of its requirements have been met. *Schiavone*, 477 U.S. at 29. There is no "choice between a 'liberal' approach . . . and a 'technical' interpretation. . . . The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says." *Id.* at 30.

Thus, as the moving party, respondent bore the burden of demonstrating literal compliance with each of the rule's standards. However, under the construction of the Rule approved by the court of appeals, no such compliance is required.

The district court voiced the theory, since rejected in *Schiavone*, 477 U.S. at 30, that "Rule 15(c) is to be liberally construed". SA 65. It then concluded that the Rule's requirements had been satisfied since:

> . . . no prejudice should result here since by virtue of the fact defendants will share the same attorney and are members of the same or interrelated organizations, at least constructive notice of the action can be imputed. . . [and], it is clear from the papers that plaintiff could not have reasonably ascertained the identities of the defendants before he received the . . . letter of December 3, 1983.

SA 65-66.

In analyzing the requirements of Rule 15(c), the district court focused, not on petitioner's knowledge *vel non* of respondent's failure to name him due to mistake, but solely on respondent's alleged inability to determine petitioner's identity due to illiteracy and lack of information. Such interpretations of the "mistake" and "knowledge" requirements cannot be squared with the plain language of Rule 15(c) which requires that relation back is permitted only where the defendants to be added knew or should have known, within the statute of limitations period, that, but for a mistake, plaintiff would have named them as defendants in the original complaint.

Nor do these interpretations comport with the decisions of the other courts of appeals applying the "known mistake" requirement. "Rule 15(c) was intended to protect a plaintiff who mistakenly names a party and then discovers, after the relevant statute of limitations has run, the identity of the proper party." *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 857-58

(9th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). Thus, the Second Circuit is in conflict with the Seventh and Ninth Circuits which have refused to permit relation back where "there is a lack of knowledge of the proper party", *Wood v. Worachek*, 618 F.2d 1225, 1230 (7th Cir. 1980) (citing *Sassi v. Breier*, 584 F.2d 234 (7th Cir. 1978)), or where the plaintiff has simply named a fictitious defendant, *Craig v. United States*, 413 F.2d 854 (9th Cir.), *cert. denied*, 396 U.S. 987 (1969).

Other courts of appeals have applied the "mistake" provision where the party to be added had made a billing error which resulted in the failure to name the proper party, *Trace X Chemical, Inc. v. Gulf Oil Chemical Company*, 724 F.2d 68, 70-71 (8th Cir. 1983), was the president and 97% owner of the original defendant, *Itel Capital Corporation v. Cups Coal Company, Inc.*, 707 F.2d 1253, 1258 (11th Cir. 1983), and was the personal representative of the estate of the named defendant who had died after the cause of action accrued but before the action was commenced, *Loudenslager v. Teeple*, 466 F.2d 249, 250 (3d Cir. 1972). In contrast to the limited readings of "mistake" by five courts of appeals, the Second Circuit, by equating a plaintiff's inability to determine the identity of a party with a mistaken identification of that party, has given an expansive meaning to "mistake" which is beyond that taken by any other court of appeals and is inconsistent with the "plain language" of Rule 15(c).

This strained interpretation of the "known mistake" requirement, relying on plaintiff's inability to determine petitioner's identity, is inconsistent with the purpose of statutes of limitations. Thus, this Court held that "[t]o excuse [a plaintiff] from promptly [seeking advice in the medical and legal community as to whether an injury was negligently inflicted] by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government." *United States v. Kubrick*, 444 U.S. 111, 123 (1979); *see also Phillip v. Sam Finley, Inc.*, 270 F. Supp. 292, 294 (W.D. Va. 1967). Under the court of appeals' decision, a plaintiff who has commenced an action but is unable despite due diligence to learn the

identity of a particular defendant is permitted to maintain an action against that defendant if he learns of his identity after the statute of limitations has passed. While a policy argument can be made that, in such a situation, the defendant's interests in repose and his need to timely prepare and adequately investigate his defenses should be subordinated to the plaintiff's right to sue, that is simply not the policy choice embodied in Rule 15(c).

The court's reliance solely on respondent's inability to identify petitioner to satisfy the "mistake" requirement is also inconsistent with Rule 15(c)'s direction that the party to be added have knowledge of that "mistake" and assumes that some party had knowledge of the "mistake" which could be deemed to be petitioner's knowledge. However, it is undisputed that petitioner had no knowledge of this action until 1984 and that none of the other timely served defendants could have had any knowledge that, but for the mistake, petitioner would have been named as a defendant. None of the other defendants named in the original complaint were in the same part of Arthur Kill as petitioner and none were involved in the same part of the incident. Accordingly, by permitting relation back in such circumstances, the court of appeals' decision has eliminated from the "known mistake" component of Rule 15(c) the requirement of knowledge.

The court of appeals also permitted relation back based on the conclusion that imputation of notice through the attorney representing the timely served defendants and petitioner, or through another defendant employed by the common employer of all defendants, was sufficient to avoid prejudice to petitioner. Such a conclusion, apparently grounded on the concept that those persons have some shared legal interest, is contrary to the plain language of Rule 15(c). As stated by the Third Circuit, "[t]here is no support in the rule or the advisory committee note for [an 'identity-of-interest'] exception" to Rule 15(c). *Schiavone v. Fortune*, 750 F.2d 15, 18 (3d Cir. 1984), *aff'd on other grounds*, 477 U.S. 21 (1986). And, while a number of circuits have also accepted the proposition that some concept of shared legal interests can justify imputing notice to a later

named defendant, virtually all of the decisions were rendered prior to *Schiavone* and none of them address the question whether such notice is consistent with the plain language of Rule 15(c). *See Barkins v. International Inns, Inc.*, 825 F.2d 905, 907 (5th Cir. 1987); *Berndt v. State of Tennessee*, 796 F.2d 879, 884 (6th Cir. 1986); *Korn v. Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397, 1399-1401 (9th Cir. 1984); *Itel Capital Corporation*, 707 F.2d at 1258; *Norton v. International Harvester Company*, 627 F.2d 18, 20-22 (7th Cir. 1980); *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 102-03 (1st Cir. 1979); *Loudenslager*, 466 F.2d at 250; *Travelers Indemnity Co. v. United States*, 382 F.2d 103, 106 (10th Cir. 1967).

In addition to being contrary to the plain language of Rule 15(c), the Second Circuit's holding is based on assumptions of dubious validity. The imputation of notice through an attorney is based on the assumption that whenever an attorney represents a defendant involved in a particular occurrence, the investigation made to prepare the defense of that defendant will be sufficient for all other subsequently named defendants, even where the initial defendant is alleged to committed a different wrong than the other defendants. This assumption is unwarranted because unless the attorney is made aware that a particular individual is a defendant in the suit, there might well be no reason to elicit his recollection of the underlying event at a time when his memory is relatively fresh or to investigate his involvement, or lack thereof, in the event.

Thus, in *Wood*, 618 F.2d at 1230, the court of appeals held that "[s]ince the claims asserted by the plaintiff against defendants Worachek and Goulet, as jailers, are separate and distinct from the claims asserted against defendant Sobcyk, he does not have the benefit of the pretrial discovery and trial defense preparation undertaken on behalf of defendants Worachek and Goulet." *See also Craig*, 413 F.2d at 858. Here, the claim against a person identified only as Correction Officer "A", was separate and distinct, both in time and location, from the claims against the other original defendants. Thus, an investigation of petitioner's role in the incident was not necessary to the preparation of the other defendants' defense and, indeed, none

was done. SA 271. Moreover, the evidence showed that during the incident, because of the sit-down strike which had occurred earlier that day and the possibility of further incidents, a large number of uniformed correction officers were present throughout the facility. SA 143, 213. A holding, in these circumstances, that petitioner had constructive notice of the commencement of the action against him is wholly at odds with Rule 15(c)'s command that the added defendant have "received such notice . . . that [he] will not be prejudiced in maintaining his defense."

Similarly, the court's apparent assumption that the defendant to be added can be presumed to have received notice from a fellow employee-defendant or his employer is ill founded. Although allowing constructive notice may have some logic when the defendant to be added is the majority owner of a corporation which is already a defendant, *Itel Capital Corp.*, 707 F.2d at 1258, a corporation composed of the original individual defendants, *Donovan v. Gillmor*, 535 F. Supp. 154, 159 (N.D. Ohio), *app. dism'd*, 708 F.2d 723 (6th Cir. 1982) (table), one of a series of interrelated corporations or organizations, some of whom are already defendants, *Korn*, 724 F.2d at 1401; *Dutka v. Southern Railway Co.*, 92 F.R.D. 375, 378 (N.D. Ga. 1981), a corporation which succeeded the defendant sole proprietorship and is operated by the former proprietor, *Harmon v. Adams & Sons Roofing Co.*, 120 F.R.D. 78, 81 (N.D. Ind. 1987), or the head of the defendant government agency which is itself not subject to suit, *Kirk v. Cronvich*, 629 F.2d 404, 408 n.4 (5th Cir. 1980), its rationale completely disappears when applied with respect to individuals employed by any organization as large as the New York State Department of Correctional Services, in a segment of that organization as large as the facility involved here and in a position as highly staffed as that of correction officer. It is simply illogical to impute notice to a single individual based merely on the fact that petitioner had the same employer where in 1980 that employer had over twelve thousand employees, was responsible for over twenty-three thousand inmates, operated more than thirty separate facilities throughout the state and its officers and employees were named in thousands of lawsuits every year.

Permitting relation back simply because of the fortuity that the subsequently named defendant has the same employer, or later retained the same counsel, as the earlier defendants, unfairly prejudices the later named defendant by invalidating a limitations defense without any showing either that the later named defendant was likely to have been notified of the action by one of the other defendants who was timely served, or that a defense for the new defendant would have been previously prepared by the shared attorney. This is particularly unfair when the failure to name the subsequently added defendant in the complaint is due to plaintiff's inability to identify that defendant, an inability probably also shared by the other defendants, rather than being due to a mistaken naming of the original defendant which is known to the proper defendant. Such constructive notice, therefore, is inconsistent with the direction of Rule 15(c) that the defendant to be added receive "such notice . . . that the party will not be prejudiced".

In addition, imputation of notice through an attorney or employer will discourage individual governmental defendants from employing the same attorney, frequently provided by the state, and will compel those defendants and the governmental employer to arrange, at far greater public expense, for separate and private representation for each defendant to ensure that a defendant does not lose a meritorious defense. It will put a public employer in the position of undertaking extensive investigations every time a complaint is served to try to determine which of its employees may be involved, however tangentially, with any claim raised in the complaint.

The constructive notice approach appears to be based in large part on the view that it is fair to impute notice to subsequently named employees because the government for which those persons work will indemnify that employee in any event. *See, e.g., DuPree v. Walters*, 116 F.R.D. 31, 34 n.2 (S.D.N.Y. 1987); *Davis v. Krauss*, 93 F.R.D. 580, 582-83 (E.D.N.Y. 1982). This view is unwarranted, first, because it rests upon a plain mis-

reading of state law.[4] Second, even if it were fair to assume that a state employee would necessarily be indemnified by the state, the assumption that the state is thus the "real party in interest", *Davis*, 93 F.R.D. at 582-83, is inconsistent with the Eleventh Amendment of the United States Constitution. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945).

C. The Decision of the Court of Appeals Conflicts With Decisions of this Court and of other Courts of Appeals Concerning 1) the Applicability of a Qualified Immunity Defense to a Claim Under the Eighth Amendment and 2) the Extent to Which Such an Immunity Bars Liability For an Alleged Failure to Protect a Prison Inmate From Attack.

Finally, the decision of the court of appeals also presents the question whether the rejection of petitioner's qualified immunity defense is consistent with this Court's decisions and that of the other courts of appeals. On summary judgment, the district court, while recognizing that the test for qualified immunity is objective, denied the motion because whether petitioner was the Correction Officer "A" named in the original complaint was in dispute. 5d. At trial, petitioner again contended that he was entitled to qualified immunity dismissing respondent's claim against him and unsuccessfully sought a directed verdict at the close of plaintiff's case on that basis. 5a. Petitioner submits that none of the reasons relied upon for rejecting the defense comport with this Court's pronouncements on qualified immunity. Rather, petitioner's qualified immunity defense can be rejected only if an objectively reasonable correction officer in petitioner's position would have known that his actions would

4 "The state shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court . . .; provided, that the act or omission . . . occurred while the employee was acting within the scope of his public employment or duties; the duty to indemnify and save harmless . . . shall not arise where the injury or damage resulted from intentional wrongdoing on the part of the employee." N.Y. Public Officers Law 17 subd. 3.

violate Stubbs' constitutional rights. Thus, this petition presents the question whether (viewing the evidence in the light most favorable to Stubbs) a correction officer at the Administration door, which led to the hospital, armory and administration offices, seeing twenty or more inmates armed with knives and desk legs running towards him, could have reasonably believed it lawful to run and get the key to the Administration door, go through the door and lock it, and, when Stubbs reached the door, not open it, thus denying Stubbs and the other inmates access to a secure area of the prison.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court announced a new formulation of the qualified immunity doctrine. Government officials sued under the Constitution or 42 U.S.C. § 1983 "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights *of which a reasonable person would have known.*" *Id.* at 818 (emphasis added); *see also Malley v. Briggs*, 475 U.S. 335 (1986); *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985). This Court's shift to an entirely objective standard was expressly motivated by the concern that the subjective standard had been inadequate to protect government officials. *Harlow*, 457 U.S. at 815-18. As noted more recently, "permitting damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, ____ U.S. ____, 107 S. Ct. 3034 (1987). By "defining the limits of qualified immunity essentially in objective terms," *Harlow*, 457 U.S. at 819, the Court sought to reduce these social costs. *See also Mitchell*, 472 U.S. at 525-26.

This position was reiterated in *Anderson*, 107 S. Ct. at 3037. The Court set forth the appropriate manner in which to frame the relevant inquiry when it stated that "[s]omewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . , assessed in light of the legal rules that were 'clearly established' at the time it was taken. . . ." *Id.* at 3038

(citations omitted). As many constitutional rights are "clearly established" as general propositions, however, "[t]he operation of the standard . . . depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson*, 107 S. Ct. at 3038. Whether or not immunity is available, therefore, "will often require examination of the information possessed" by the decision-maker. *Id.* at 3040. Otherwise, "plaintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading." *Id.* at 3039.

In order to satisfy that test, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* Although there are "inherent difficulties in either characterizing the right too generally . . . or describing the fact situation with such detail that each case becomes unique . . . , case law in a closely analogous area is essential to permit . . . [the] conclu[sion] that the constitutional right was clearly established at the time of the alleged violation." *Conner v. Reinhard*, 847 F.2d 384, 388 (7th Cir.), *cert. denied*, ____ U.S. ____, 109 S. Ct. 147 (1988); *see also Clark v. Evans*, 840 F.2d 876, 880-82 (11th Cir. 1988); *Martin v. Malhoyt*, 830 F.2d 237, 263 (D.C. Cir. 1987); *but see*, *Stevens*, 832 F.2d at 890.

Applying the *Harlow* standard, as refined by *Anderson*, to the present case, requires examination, in light of the clearly established law in 1977, of the decision by an unarmed corrections officer to lock the door to a secured area and not to open it to rescue an inmate under attack by at least twenty other armed inmates. If a reasonable corrections officer could have believed that the decision to lock and not to open the door was lawful, petitioner is entitled to qualified immunity from liability in damages.

In 1977, it was accepted that corrections officials owed a general duty of care to the inmates, *see*, *e.g.*, *Estelle*, 429 U.S. 97. However, the concept was only beginning to evolve that officials in charge of prisons had a duty to protect inmates in the face of known risks, *see*, *e.g.*, *Parker v. McKeithen*, 488 F.2d 553 (5th Cir.) (knowledge that many inmates possessed weapons, record of substantial violence by the ultimate attacker, specific threats against plaintiff), *cert. denied*, 419 U.S. 838 (1974); *Woodhous v. Commonwealth of Virginia*, 487 F.2d 889, 890 (4th Cir. 1973) (prisoner has an eighth amendment right to be protected from constant threat of violence and sexual assault), and to protect the overall inmate populace, *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971). At the same time, the cases also indicated that an "occasional, isolated attack by one prisoner on another may not constitute cruel and unusual punishment". *See*, *e.g.*, *Woodhous*, 487 F.2d at 890.

There was a paucity of cases in 1977 concerning the obligation of an individual corrections officer to protect an individual inmate from attack by other inmates. To the extent that any such broad duty was recognized, its scope and contours were far from clear. For example, in *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974), the inmate Williams alleged that a guard standing next to Williams saw another inmate approaching Williams from behind, had an opportunity to protect him, but instead jumped back and out of the way. The circuit found these allegations insufficient. Conversely, in *Fox v. Sullivan*, 539 F.2d 1065 (5th Cir. 1976), *appeal after remand*, 558 F.2d 235 (1977), the court of appeals reversed a judgment dismissing a claim that a guard had opened the door of a cell whereupon inmates stabbed the emerging occupant. In the state of the law then existing, there were no analogous cases from this Court, from the Courts of Appeals, or from the District Courts, from which it can be concluded that it was clearly established in 1977 that a single unarmed corrections officer, without any means of immediate communication, in order to protect a single inmate from attack by at least twenty other inmates, armed with knives and table legs, had a duty to keep open a door to a secure and vital part of the prison. Thus, the level of specificity at which the law was "clearly established" was insufficient to satisfy the test for defeating qualified immunity. *Anderson*, 107 S. Ct. at 3039. The failure of the court of appeals to reach this conclu-

sion, in light of *Harlow*, *Malley* and *Anderson*, warrants review by this Court.

CONCLUSION

FOR THE REASONS STATED HEREIN, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
November 22, 1988

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioner

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

BARBARA B. BUTLER*
FREDERIC L. LIEBERMAN
Assistant Attorneys General

Of Counsel

**Counsel of Record*

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 836—August Term 1987
Argued: March 2, 1988 Decided: June 13, 1988
Docket No. 87-2402

JOHN STUBBS,
Plaintiff-Appellant,
—v.—
C.O. ROBERT DUDLEY, individually and as an employee of the New York Department of Corrections,
Defendant-Appellee,
—and—
ROBERT E. MCCLAY, individually and as Superintendent of the Arthur Kill Correctional Facility; C.O. CLEMMONS (phonic), individually and as an employee of the New York Department of Corrections; C.O. LEWIS, (phonic), individually and as an employee of the New York Department of Corrections; ROBERT A. HOKE, individually and as Deputy Superintendent of Programs of the Arthur Kill Correctional Facility; C.O. DOMENICO 'RUFINO', individually and as employee of the New York Department of Corrections; and C.O. 'JOHN' RANZER, individually and as an employee of the New York Department of Corrections,
Defendants.

Before:

KAUFMAN, OAKES, and NEWMAN,
Circuit Judges.

Appeal from a judgment of the District Court for the Eastern District of New York (John L. Caden, Magistrate) in favor of defendant, entered notwithstanding a jury verdict in favor of plaintiff for violating plaintiff's constitutional rights under the Eighth and Fourteenth Amendments.

Reversed and remanded.

ARTHUR G. NEVINS, Jr., New York, N.Y., *for plaintiff-appellant.*

BARBARA B. BUTLER, Asst. Atty. Gen., New York, N.Y. (Robert Abrams, Atty. Gen., Frederic L. Lieberman, Asst. Atty. Gen., New York, N.Y., on the brief), *for defendant-appellee.*

JON O. NEWMAN, *Circuit Judge*:

This appeal concerns the sufficiency of evidence to support a jury verdict in favor of a prisoner claiming that a corrections officer violated his constitutional rights by deliberately failing to protect him from injury by other prisoners. John Stubbs appeals from a judgment of the

District Court for the Eastern District of New York (John L. Caden, Magistrate) entered in favor of defendant-appellee John Dudley notwithstanding a jury verdict finding Dudley liable under 42 U.S.C. § 1983 (1982) for violating Stubbs' constitutional rights under the Eighth and Fourteenth Amendments. The jury had awarded Stubbs $26,000 in compensatory damages for injuries sustained in a beating by his fellow inmates at the Arthur Kill Correctional Facility. Magistrate Caden granted defendant's motion for judgment notwithstanding the verdict (n.o.v.) on the ground that the evidence did not support a finding that Dudley was deliberately indifferent to Stubbs' safety. We reverse and remand.

Background

Viewed in the light most favorable to Stubbs, the evidence establishes that the following events occurred on February 4, 1977, at the Arthur Kill Correctional Facility on Staten Island, New York, where Stubbs was an inmate. After dinner, Stubbs left his cell to make a telephone call when he was confronted in the "C" Corridor by approximately twenty to thirty inmates, apparently Muslims who were angry at Stubbs for unclear reasons. Some of the men were armed, at least one with a knife. Stubbs was not armed. Hostile words were exchanged, and at least one of the men attempted to strike Stubbs. In fear of being harmed, Stubbs ran down the "C" Corridor with the group of men in pursuit. Stubbs passed through a set of double doors and turned a corner, entering the "Main" Corridor. As he turned the corner, Stubbs saw two corrections officers standing next to a locked door, midway down the corridor, which led to the administration area. One of the corrections officers was defendant Dudley.

Stubbs ran toward the defendant yelling, "Help! Open the door, open the door!" Dudley and the other officer opened the door, but immediately went through it and closed and locked it behind them, leaving Stubbs to fend for himself in the main corridor.

Stubbs stood for a moment trying to open the locked door. Through the plexiglass of the door he could see Dudley observing his desperate predicament. As his assailants neared him, Stubbs turned and ran farther down the hallway to the "B" Block telephone room, where two other corrections officers were stationed. These officers, Lewis and Clements, hid behind a plastic partition. Stubbs, now cornered, was quickly overpowered by the group of inmates. He was severely beaten and possibly stabbed, and required hospitalization as a result of his injuries.

The section 1983 claim was tried by agreement before Magistrate Caden and a jury. Before the jury trial, all of Stubbs' state law claims were dismissed, as were the federal claims against all defendants other than appellee Dudley and Lewis, the corrections officer in the telephone room. Statute of limitations and qualified immunity defenses raised by Dudley were rejected both by Judge Henry Bramwell, to whom the case was originally assigned, and upon renewal by Magistrate Caden.

The jury returned a verdict in favor of defendant Lewis and against defendant-appellee Dudley. Compensatory damages of $26,000, but no punitive damages, were awarded to Stubbs. By Memorandum and Order dated September 3, 1987, Magistrate Caden granted Dudley's motion for judgment n.o.v., *see* Fed. R. Civ. P. 50(b).

Discussion

At the outset, we reject appellant's procedural challenges to the judgment n.o.v. ruling. Dudley's motion for a directed verdict at the close of plaintiff's case was renewed at the close of all the evidence and challenged the sufficiency of the evidence with adequate precision to preserve the issue under Rule 50(b). Though the motion primarily emphasized a qualified immunity defense, it fully apprised appellant of Dudley's basic contention that the evidence was insufficient to support the deliberate indifference claim. *See Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, No. 87-7279, slip op. at 5919-20 (2d Cir. Nov. 9, 1987). Appellant's additional claims of procedural irregularities are without merit.

The standard for granting a motion for judgment n.o.v. is appropriately strict. A verdict may be directed under Rule 50 only if, "without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached." *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970). *See also Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 573 (2d Cir.), *cert. denied*, 459 U.S. 838 (1982); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524 (1971). Alternative versions of this standard have recently been summarized:

> [E]ither there must be "such a complete absence of evidence supporting the verdict that the jury's finding could only have been the result o[f] sheer surmise and conjecture" or the evidence must be so overwhelming that reasonable and fair-minded persons could only have reached the opposite result. *Newmont Mines Ltd. v. Hanover Insurance Co.*, 784 F.2d 127, 132 (2d

Cir. 1986) (quoting *Mallis v. Bankers Trust Co.*, 717 F.2d 683, 688-89 (2d Cir. 1983)).

Baskin v. Hawley, 807 F.2d 1120, 1129 (2d Cir. 1986). We conclude that in the present case this standard was not met.

An inmate who is injured as a result of a prison official's deliberate indifference to his safety may maintain a damage action for the deprivation of his civil rights under the Eighth and Fourteenth Amendments. *Whitley v. Albers*, 106 S. Ct. 1078, 1084 (1986); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Bass v. Jackson*, 790 F.2d 260, 262-63 (2d Cir. 1986); *Ayers v. Coughlin*, 780 F.2d 205, 209 (2d Cir. 1985) (per curiam); *Williams v. Vincent*, 508 F.2d 541, 543-44, 546 (2d Cir. 1974). Though the law is now settled that mere negligence will not give rise to a constitutional violation, *see Daniels v. Williams*, 474 U.S. 327 (1986), it is equally clear that a showing of "express intent to inflict unnecessary pain is not required," *Whitley v. Albers*, *supra*, 106 S. Ct. at 1084 (citing *Estelle v. Gamble*, *supra*); *cf. O'Neill v. Krzeminski*, 839 F.2d 9, 11 n.1 (2d Cir. 1988) (proof that defendant acted "maliciously and sadistically" permissible but not required to establish use of excessive force).

The jury charge in the present case faithfully conveyed this understanding of the applicable legal framework. Magistrate Caden instructed the jury, in pertinent part:

> You must find for a defendant unless you find that the plaintiff has proven that that defendant acted with an intent to cause harm to the plaintiff or with deliberate indifference to plaintiff's safety and not in a good faith effort to carry out his lawful duties. In considering this question, consider the fact that a defendant must make quick decisions and act promptly and under tension created by crisis.

More detailed instructions, describing the alternative degrees of intent upon which a plaintiff's verdict might rest, were also given to the jury. Magistrate Caden carefully defined "intent" and conduct done "intentionally," "deliberately," or "recklessly." He also pointedly instructed the jury that "[m]ere negligence, that is, failure to act with reasonable care under the circumstance to protect plaintiff, does not rise to the level of a violation of civil rights."[1]

After the jury, thus properly instructed, returned a verdict in favor of Stubbs, Magistrate Caden granted judgment n.o.v. evidently in the mistaken belief that the Supreme Court's recent decision in *Whitley v. Albers*, *supra*, requires something more than "deliberate indifference" to establish a constitutional violation under the circumstances of this case.[2] Though he used the phrase "deliberate indifference" in discussing the constitutional standard in his judgment n.o.v. decision, Magistrate Caden appears to have read *Whitley* as requiring a finding of malice in order to meet this standard. This was error.

Whitley concerned a claim brought by a prisoner shot in the leg by a guard during a prison riot. The Court deter-

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1 At one point in the middle of the trial, Magistrate Caden interrupted plaintiff's cross-examination of a witness to instruct the jury at some length that "[w]e are not talking, in this particular case, about whether or not these Correction Officers acted reasonably or unreasonably. That's not involved in this case. . . . Negligence has nothing to do with this case."

2 The Magistrate had previously refused defendants' proposed charge, requested under the purported authority of *Whitley*, which would have required the jury to find that the defendants acted "maliciously and sadistically for the very purpose of causing harm."

mined that the "deliberate indifference" standard normally applicable to such a claim may not sufficiently take into account "competing institutional concerns" where the officials are "making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance." 106 S. Ct. at 1084. A standard of "obduracy and wantonness" was deemed appropriate under these special circumstances. We need not decide, however, whether the jury's verdict could be sustained even under the *Whitley* "wantonness" standard. *Whitley* involved a full-blown prison riot. In the present case the condition creating the "prison disturbance" was the Stubbs incident itself: twenty or more angry prisoners wanted to hurt one prisoner.[3] The issue put to the jury was whether the defendant corrections officers acted unconstitutionally in allowing them to do so. The only "competing institutional concern[ ]" in this context was whether the defendants, by aiding Stubbs, might plausibly put prison security (or their own safety) at risk. This was for the jury to decide under the "deliberate indifference" standard. *Whitley* does not require that every case involving a guard's failure to protect a prisoner threatened by other prisoners be decided under a heightened standard appropriate for determining the lawfulness of using force to quell a prison riot. *See Pressly v. Hutto*, 816 F.2d 977, 979 (4th Cir. 1987) (*Whitley* standard applicable only "where physical force [is] directly applied by prison officials to maintain security or discipline").

We are satisfied that the jury, properly charged, could reasonably have found that Dudley, without plausible jus-

3 There was also some evidence that the prison's Muslim population was engaged in a "sit-down strike" on the day of the incident. However, this situation apparently created no unusual threat to prison security.

tification, displayed deliberate indifference in failing to prevent the beating of Stubbs despite having had the opportunity to do so. The evidence supports the conclusion that Dudley had adequate time to assess the serious threat facing Stubbs and a fair opportunity to afford him protection at no risk to himself or the security of the prison but nevertheless callously refused to permit Stubbs to pass with him to safety behind the administration door. This conduct could reasonably be found to be deliberate indifference, "tantamount to a knowing willingness that [the harm] occur." *Whitley v. Albers*, *supra*, 106 S. Ct. at 1085 (citation omitted). Our confidence in this conclusion is reenforced by the fact that the jury returned a verdict in favor of the defendant Lewis. The jury apparently understood that the corrections officers were not required to risk their own welfare in order to protect Stubbs. The Constitution imposes a standard of human decency, not superhuman courage. The jury was entitled to find that defendant Dudley failed that standard in this case.

We have considered appellee's alternative arguments for dismissal on statute of limitations and qualified immunity grounds and agree with Judge Bramwell and Magistrate Caden that they are without merit.

The judgment of the District Court is reversed. The case is remanded with instructions to enter judgment for the plaintiff upon the jury's verdict and to consider plaintiff's claim for attorney's fees under 42 U.S.C. § 1988 (1982).

APPENDIX B

MEMORANDUM AND ORDER OF JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOHN STUBBS,

Plaintiff,

—against—

C. O. CLEMMONS, et al.,

Defendants.

CADEN, *United States Magistrate*

INTRODUCTION

On March 7, 1980, plaintiff John Stubbs ("Stubbs") a prison inmate, commenced a civil rights action against correction officers Robert Dudley ("Dudley") and Carl Lewis ("Lewis") pursuant to 42 U.S.C. § 1983. Stubbs sought both compensatory and punitive damages for injuries suffered when he was attacked by other inmates at Arthur Kill Correctional Facility. The case was tried before the undersigned on January 27, January 28, and January 29, 1987. The jury returned a verdict in favor of defendant Lewis and against defendant Dudley, having determined that Dudley alone had violated plaintiff Stubbs' constitutional rights. The case is now before the court on a motion by defendant Dudley for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50.

The standard in this circuit applicable to a motion for judgment notwithstanding the verdict is whether "the evidence, viewed in the light most favorable to the non-movants without considering credibility or weight, reasonably permits only a conclusion in the movants' favor." *Koyen* v. *Consolidated Edi-*

son Co., 560 F. Supp. 1161, 1162 (S.D.N.Y. 1983). Recently the Court of Appeals for the Second Circuit stated the standard as follows:

> A district court may enter a judgment notwithstanding the verdict when, viewing the evidence in the light most favorable to the non-moving party, (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.

Haskell v. *Kaman Corp.*, 743 F.2d 113, 120 (2d Cir. 1984).

Dudley's testimony contradicts Stubbs' testimony in many important respects. However, for purposes of this motion, and as required by the Federal Rules of Civil Procedure, in instances of conflict, Stubbs' version of an event has been accepted as true. For the reasons set forth below, the court hereby grants Dudley's motion for judgment notwithstanding the verdict and dismisses the complaint in its entirety.

BACKGROUND

On February 4, 1977, the Arthur Kill Correctional Facility was the site of a sit-down strike orchestrated by the prison's inmates. The strike was institution-wide and controlled, in the main, by a sect of prisoners known as the "Muslims." Stubbs was unaware of the strike because he had spent the day working outside the prison grounds.

That evening, as Stubbs was walking down the main corridor of C control area to make a telephone call, he was confronted by a gang of 20 or 30 Muslim prisoners. Stubbs noticed that the Muslims were carrying homemade knives measuring up to 16 inches in length, as well as other weapons wrapped in sheets. The Muslims stopped Stubbs in the hallway. One of them began to insult and harass him.

Shortly thereafter, one of the members of the gang attacked Stubbs and the rest of the mob tried to close in on him. Stubbs got away. He turned and ran for his life down the corridor and through a set of double doors. On the other side of the double doors Stubbs briefly encountered a correction officer. The correction officer, whom Stubbs did not identify, was stationed in the hall at the counter where art supplies are distributed to the inmates. Although Stubbs told the correction officer that there would be some "problems," the correction officer did not come to his assistance.

Receiving no immediate protection from the mob, Stubbs continued to run down the hall. He ran through a second set of swinging double doors, and turned right down a corridor. The mob was in hot pursuit. By this time members of the mob were throwing garbage cans and table legs through the hallway. As Stubbs ran toward the telephone room, he saw defendant Dudley and another correction officer standing in front of a door leading to the administrative control center of the prison (the "Administration door").

Stubbs cried out to Dudley and the other correction officer for help. Observing the riot in progress, rather than help Stubbs, Dudley and the other correction officer ran behind the door to safety. Defendant Dudley locked the Administration door behind them. Stubbs ran up to the door and cried, "Open the door, open the door." He turned to see that the mob was closing in on him. When neither Dudley nor his co-worker responded, Stubbs took off down the hall leading to the telephone room.

At the entrance to the telephone room, Stubbs jumped over a counter and into the room. Once inside, he saw two correction officers and one inmate. Again, Stubbs cried for help. The inmate and one of the correction officers immediately ran out of the room. The other officer, identified by Stubbs as defendant Lewis, ran and hid behind a wire screen. At this point, the mob of Muslims caught up with Stubbs and beat him severely.

At trial, Stubbs claimed that defendant Dudley violated his constitutional rights by failing to protect him from the Muslim gang. Specifically, Stubbs claimed that Dudley acted with deliberate indifference to his welfare when Dudley refused to open

the Administration door and lead Stubbs through it to safety. As evidenced by the resulting verdict against Dudley, the jury apparently agreed.

In his motion for judgment notwithstanding the verdict, defendant Dudley claims, among other things, that the evidence presented to the jury does not support its finding that he acted with deliberate indifference to Stubbs' welfare.

DISCUSSION

For an inmate to maintain a civil rights action against a correction officer, the inmate must plead and ultimately prove that he was injured as a result of the correction officer's deliberate indifference to his welfare. *See Daniels* v. *Williams*, 106 S.Ct. 662, 664 (1986) (quoting *Estelle* v. *Gamble*, 429 U.S. 105, 106 (1976)). Deliberate indifference is characterized by acts or omissions motivated by obduracy and wantonness. *Whitley* v. *Albers*, 106 S.Ct. 1078, 1084 (1986). Thus, to prove deliberate indifference, a plaintiff need not go so far as to establish that a correction officer harbored an express intent to inflict unnecessary pain. *Id.* However, under no circumstances will a correction officer's negligence, inadvertence or good faith error be deemed deliberate indifference violative of an inmate's constitutional rights. *Id. See also Davidson* v. *Cannon*, 106 S.Ct. 668, 670 (1986). As the Supreme Court has stated, "the guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials." *Davidson*, 106 S.Ct. at 670.

In cases such as the one before the court, where an alleged violation of an inmate's constitutional rights occurred in the course of, or as a result of, a prison disturbance, the Supreme Court has emphasized the need to balance "competing institutional concerns," such as the safety of the prison staff, and the well being of the prison's inmates. *Whitley*, 106 S.Ct. at 1084-85. Further, as the deliberate indifference standard has developed, the Court has emphasized that a prison has a legitimate and protected interest in maintaining prison security which may, at times, take precedence over the individual rights of the

inmates. In this regard, the Court recently stated that "prison administrators . . . should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Whitley*, 106 S.Ct. at 1085 (1986) (quoting *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979)). Thus, in determining whether a correction officer acted with deliberate indifference toward an inmate, the courts carefully consider the circumstances surrounding the incident. Split second decisions made with a sense of urgency, in an uncontrollable situation, are judged less critically than decisions made after options have been presented and evaluated. *See Whitley*, 106 S.Ct. at 1085.

For a civil rights complaint against a prison guard to survive a motion to dismiss, the court must find that the complainant has sufficiently alleged facts to support his claim that the guard acted with deliberate indifference to his welfare. For example, in *Johnson* v. *Glick*, 481 F.2d 1028 (2d Cir. 1973), the court of appeals reversed the district court's dismissal of a Section 1983 complaint brought by an inmate against a prison guard for injuries sustained by the inmate when the prison guard attacked him without provocation. After the assault, the guard allegedly harassed the inmate by detaining him in a holding cell for two hours. Further, when asked by another correction officer to escort the inmate to the jail physician, the defendant prison guard chose instead to hold the inmate in his cell for an additional two hours before taking him to see the doctor.

In *Johnson* the court found that plaintiff's allegations regarding the correction officer's misconduct were sufficient to state a claim under section 1983. The court considered a variety of factors including the amount of force used by the correction officer, the need for force under the circumstances, the extent of injury inflicted upon the inmate and whether the force was applied in good faith to maintain control, or maliciously and sadistically to cause harm. *Johnson*, 481 F.2d at 1033.

Similarly, in *Curtis* v. *Everette*, 489 F.2d 516 (3d Cir. 1973), the court reversed the dismissal of a section 1983 complaint filed by an inmate against correction officers who were present when the inmate was attacked by a fellow inmate. The plaintiff

alleged that the correction officers failed to protect him and, in so doing, allowed the inmate to attack the plaintiff a second time, causing him to lose his right eye. The court held that the complaint alleged facts sufficient to support the plaintiff's allegation of deliberate indifference on the part of the correction officers in light of plaintiff's claim that the defendant correction officers had actual knowledge of the assaulting inmate's dangerous nature. *Curtis*, 489 F.2d at 518.

In sharp contrast to the cases described above, and akin to the instant case is *Whitley* v. *Albers*, a section 1983 action commenced by a prisoner shot in the leg by a prison guard during the quelling of a prison riot. 106 S.Ct. at 1083. At the conclusion of the trial, the District Judge directed a verdict for defendants. The court of appeals reversed, holding that an Eight Amendment violation would be established only "if a prison official deliberately shot [plaintiff] under circumstances where the official, with due allowance for the exigency, knew or should have known that it was unnecessary," or "if the emergency plan was adopted or carried out with 'deliberate indifference' to the right of [plaintiff] to be free from cruel and unusual punishment." *Whitley* v. *Albers*, 743 F.2d 1372, 1375 (9th Cir. 1984).

The Supreme Court reversed the court of appeals and ruled that defendants were entitled to a directed verdict. In so doing, the Court stated that ordinary errors of judgment, while perhaps unreasonable, do not properly lead to the inference of wantonness necessary to support a constitutional claim. *Whitley*, 106 S.Ct. at 1086-87. Further, the Court emphasized that a correction officer acting in the midst of a prison disturbance "must take into account the very real threats the unrest presents to inmates and prison officials alike." *Id.* at 1084. Accordingly, "officials cannot realistically be expected to consider every contingency or minimize every risk." *Id.* at 1087. Nor are correction officers expected to protect an inmate from other inmates without regard for prison security or their own personal safety.

Against this backdrop, it is evident that while the jury could have found that Dudley was unreasonable or negligent in failing to protect Stubbs, Dudley's omission cannot reasonably lead to an inference of deliberate indifference. From Stubbs' testimony

it is clear that: (1) there was a serious threat to prison security at the time Stubbs sought Dudley's protection; (2) Dudley acted without ill will or malice; and (3) prior to the attack upon Stubbs, Dudley had no knowledge of either a threat to Stubbs' life or the possibility that Stubbs would be attacked.

(1) *The Threat to Prison Security*

Stubbs testified that a prison riot was ongoing when he approached the Administration door and asked Dudley to let him in. Stubbs described a large mob running through the halls of the prison carrying knives and tearing apart prison property. Under these circumstances, Dudley's decision to lock the Administration door and deny Stubbs entry must be viewed as a reasonable measure taken to protect himself and the rest of the prison. The melee which Stubbs vividly described was hardly a situation which could be controlled by the handful of prison guards stationed in the area.

Further, given the exigency of the circumstances, it is highly doubtful that Dudley had an opportunity to evaluate the options or consider all of the ramifications of his locking the Administration door. *See Whitley*, 106 S.Ct. at 1085. Stubbs testified that he ran up to the Administration door, cried to be let in and then continued running. He stopped for only several seconds in front of the Administration door, as he realized the danger of pausing to ask for help.

Having seen the mob, Dudley was faced with a choice. Ultimately, he did what he thought was best for the prison and himself. The fact that there may have been other options open to him is inconsequential since they can only be evaluated in hindsight.

The priority that the courts place on the maintenance of prison security when considering whether a correction officer has exhibited deliberate indifference to the welfare of an inmate "requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice. Accordingly, . . . courts must determine whether the evidence goes beyond a mere dispute over the reasonableness of

a particular use of force or the existence of arguably superior alternatives." *Whitley*, 106 S.Ct. 1085 (1986).

In this case the evidence does not go so far. Dudley took action in a tense, emergency situation. While a jury might conclude that his actions were unreasonable or that Dudley failed to fully extend himself in order to protect Stubbs, an inference of deliberate indifference cannot be drawn therefrom.

(2) *Dudley Harbored No Ill Will or Malice Against Stubbs*

In determining whether a correction officer has violated an inmate's civil rights "there must be present circumstances indicating an evil intent, or recklessness, or at least deliberate indifference to the consequences of his conduct for those under his control or dependent upon him." *Arroyo* v. *Schaeffer*, 548 F.2d 47, 49 (2d Cir. 1977) (quoting *Williams* v. *Vincent*, 508 F.2d 541, 543-44, 546 (2d Cir. 1974)). There is absolutely no evidence in the record that Dudley harbored any animosity towards Stubbs. In fact, Stubbs testified that he did not know who Dudley was, just that "he was police." (Tr. 134).

Dudley may have acted out of fear for his life, or may have been following prison procedure in protecting the Adminstrative nerve center of the prison. At the very worst, he may have negligently or unreasonably failed to consider what extraordinary actions he could have taken to save Stubbs from the mob. However, even this omission, if it did in fact occur, is insufficient to support an inference of either deliberate indifference or intentional disregard of Stubbs' welfare. *Whitley*, 106 S.Ct. at 1087.

(3) *Dudley Had No Foreknowledge of the Threat to Stubbs' Life*

There is no evidence that Officer Dudley had any knowledge of any prior altercations that Stubbs may have had previously with the Muslim prisoners. Nor has it been established that Dudley knew there would be problems between Stubbs and other inmates as a result of the inmate strike. Stubbs himself testified that he knew of no problems in his area since he was out working all day. (Tr. 35, 37). The only notice of trouble

that Dudley had was that he saw Stubbs run through the swinging doors toward the Administration door with the mob in hot pursuit.

The ensuing events occurred so quickly and in such a short space of time that Dudley cannot be held to have had sufficient foreknowledge of Stubbs' impending danger to assess all the merits and disadvantages of every available course of action. Further, it is beyond doubt that Dudley did not have sufficient time to consider all the alternatives available to help save Stubbs. Under these circumstances, it is not for the jury to determine whether another course of action was preferable.

Given the exigent circumstances, it is obvious that Dudley acted quickly to respond to the dangerous situation with which he was confronted. His failure to take into account Stubbs' welfare may have been unfortunate but it cannot be fairly characterized as deliberately indifferent. *Whitley*, 106 S.Ct. at 1087. Accordingly, there has been no violation of Stubbs' constitutional rights as a matter of law.

The defendant's other arguments with respect to the statute of limitations, and qualified immunity have been previously rejected by either Judge Bramwell or the undersigned. Upon reconsideration, the undersigned reaffirms the court's prior rulings. Finally, the undersigned finds no merit to defendant's contention that plaintiff's counsel's summation, taken as a whole, was so prejudicial to the defendant that the verdict should be set aside or a new trial granted.

CONCLUSION

For the reasons stated above, the defendant's motion for judgment notwithstanding the verdict is granted. Accordingly, the court dismisses the plaintiff's complaint in its entirety and enters judgment for defendant Dudley.

SO ORDERED.

JOHN L. CADEN

John L. Caden
United States Magistrate
Eastern District of New York

Dated: Brooklyn, New York
September 3, 1987

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

80-C-507

United States Courthouse

Brooklyn, New York

May 4, 1984
10:00 a.m.

JOHN STUBBS,

Plaintiff

—versus—

ROBERT E. MCCLAY, et al

Defendants

Before:

HONORABLE HENRY BRAMWELL, U.S.D.J.

SHELDON SILVERMAN
OFFICIAL COURT REPORTER

Appearances:

ARTHUR G. NEVINS, ESQ.
Attorney for Plaintiff

BARBARA B. BUTLER, AAG
Attorney for Defendant

THE CLERK: Stubbs versus McClay.

MR. NEVINS: The only other thing I wanted to add in refutation to the last brief filed by the Attorney General's Office is in fact plaintiff did not know the names of the additional correction officers and Mr. Hoke, up until that information was received in December of 1983.

MS. BUTLER: I suggest since all the documents that refer to these correction officers and Mr. Hoke were contained in the state court—in the records of state court proceeding. I'm not sure how they could have gotten them but certainly he should have known the names of these people and there really isn't any excuse for his waiting for seven years to obtain the names.

MR. NEVINS: In response to that I would have to say that the plaintiff cannot read. That's an established fact in the records of the prison and the state as well as we know it to be a fact. He has had, unfortunately, because of his incarceration up until, I think, a year-and-a-half ago he's had a very difficult time obtaining proper information and also obtaining proper counsel to pursue this case. He's had an unfortunate history with counsel for one reason or another. His attorney from whom I got the case had a nervous breakdown, an unfortunate pregnancy. All these things accumulated to the fact where we never got the proper discovery up until I received it in December of 1983.

THE COURT: I'm going to put the decision on the record. Be seated.

John Stubbs, plaintiff herein, currently has an action pending before this Court under Title 42, United States Code, Section 1983. Briefly, the facts giving rise to the cause of action concern a claim that plaintiff was beaten while in prison due to the purportedly intentional failure of defendants to protect him from other inmates. In connection with his preparation for trial, plaintiff moves to amend his complaint so that it would include additional persons who he believes are culpable in the circumstances underlying his claim. Defendants oppose Mr. Stubbs' motion to add the additional parties.

The basic facts relevant to the Court's consideration of this motion are rather straightforward. Plaintiff commenced this Section 1983 action on December 26, 1979 based on circumstances which purportedly occurred on February 4, 1977. He later amended his complaint to include as defendants Robert E. McClay, a Mr. Clemmons, a Mr. Lewis, John Doe and Richard Roe. Plaintiff points out that at the time the complaint was amended and filed with the Court, the true names of Defendants John Doe and Richard Roe were not known to him and they were identifiable only as employees of the New York Department of Corrections.

Subsequently, by a letter he received on December ____, 1983, Mr. Stubbs came to know the unidentified defendants as Robert Dudley, Robert A. Hoke, Dominico Ruffino and John Ranzea. In his complaint, Plaintiff Stubbs refers to these defendants as being involved in the occurrences giving rise to his cause of action under Section 1983.

The provision of law which applies here is Rule 15(c) of the Federal Rules of Civil Procedure. It is provided by Rule 15(c) that whenever a claim or defense asserted in an amended pleading arises out of the conduct, transaction or occurrence set forth in the original pleading, the amendment relates back to the date of the original pleading. Also, an amendment changing the parties against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

In considering Rule 15(c) motions, a crucial issue is whether the parties plaintiff seeks to add knew of the pendency of the action before the Statute of Limitations ran. In Rule 15(c) motions, notice must be sufficient to give a defendant actual or construed knowledge of the claim against him, and must be sufficient to encourage a defendant to begin to prepare a defense. However, there is no requirement that notice be formal. Knowledge may be imputed to a new defendant through his attorney if

the attorney also represents the party or parties originally served. Also, knowledge may be imputed when defendants are associated through an organizational relationship.

Finally, as a general matter, Rule 15(c) is to be interpreted in light of modern authorities which favor allowing amendments to prevent failure of justice especially where the Statue of Limitations has run. In brief, Rule 15(c) is to be liberally construed.

In the case at bar, all of the requirements of Rule 15(c) are met and there exists cause for granting plaintiff's motion. First, the element of "relation back" is satisfied since the conduct of defendants is sufficiently linked to the occurrences outlined in the original complaint. Second, no prejudice should result here since by virtue of the fact defendants will share the same attorney and are members of the same or interrelated organizations, at least constructive notice of the action can be imputed. Third, it is clear from the papers that plaintiff could not have reasonably ascertained the identities of the defendants before he received the abovementioned letter of December 5, 1983.

For the foregoing reasons, plaintiff's motion to amend the pleadings is granted.

You can settle an order as to the Court's decision.

I understand Magistrate Caden is to see the parties at this time. You can appear before Magistrate Caden.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

80-C-507

United States Courthouse

Brooklyn, New York

May 3, 1985
10:00 a.m.

JOHN STUBBS,

Plaintiff,

—against—

C. O. CLEMMONS, et al.,

Defendants.

Before:

HONORABLE HENRY BRAMWELL, U.S.D.J.

Appearances:

ARTHUR G. NEVINS, JR., ESQ.
Attorney for plaintiff

ROBERT ABRAMS
Attorney General of the
State of New York,
2 World Trade Center,
49th Floor, Rm. 4915,
New York, New York 10007

BY: BARBARA B. BUTLER, ESQ.
Assistant Attorney General

MS. BUTLER: I have nothing to add to the papers, your Honor.

MR. NEVINS: Nothing.

THE COURT: I will put it on the record then.

John Stubbs, plaintiff herein, has an action pending before this Court under 42 U.S.C. Section 1983, alleging violations of his rights guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and those guaranteed under Article One of the Constitution of the States of New York. Plaintiff claims that while he was an inmate of the Arthur Kill Facility, he was allowed to be beaten unconscious by other inmates as the correction officers allegedly neglected to come to his assistance during a fight. As a consequence of this occurrence and events that followed, plaintiff alleges that he sustained various injuries and deprivation of his rights including the failure of prison authorities to furnish him adequate medical assistance, and to provide him with a full and fair hearing on the circumstances surrounding the assault.

This morning, defendants Robert Dudley and Carl Lewis move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment in their favor. Defendants argue (1) that based on the uncontroverted facts of this case, neither defendant deprived plaintiff of his constitutional rights during the incident; (2) that Officer Dudley is entitled to absolute witness immunity; and (3) that Officers Dudley and Lew are entitled to good faith immunity. Plaintiff opposes the motion on several theories. First, he contends that, due to the procedural history of this case, he has not had an opportunity to depose the defendants and therefore the motion is premature. Second, he argues that triable issues of fact exist with respect to Officers Dudley's and Lewis' conduct during the incident which preclude summary judgment. Third, he argues that Officer Dudley may have falsified his testimony at the superintendent's hearing and therefore is not entitled to witness immunity. Finally, he argues that defendant Lewis' motion is barred by prior denial of summary judgment motion made on his

behalf. For the reasons set forth below, the motion of defendant Lewis is denied in all respects and the motion of defendant Dudley is granted as to his testimony before the superintendent's hearing but denied in all other respects.

Plaintiff commenced this action in January 1980 naming various officials of the Arthur Kill Facility including Officer Lewis as defendants. The basis of his claim as to Lewis was that, on February 4, 1977, when he fled into a telephone room to escape a mob of attacking inmates, Lewis and another officer allegedly hid behind a screen, watched the incident, and failed to protect him from serious injury. Defendant Dudley was not named in the original complaint. In May, 1984, however, this Court granted plaintiff's motion to amend his complaint to add various other defendants including Officer Dudley. The theory of plaintiff's claim against Dudley is that he "might have been" the officer "A" in the original complaint who allegedly locked the gate causing Stubbs to flee in the direction of the telephone room on February 4, 1977. Additionally, plaintiff alleges that had Dudley successfully closed a set of fire doors behind Stubbs to contain the other inmates, subsequent harm might have been averted. Finally, plaintiff contends that Dudley gave perjured testimony regarding the incident in a subsequent superintendent's hearing.

In support of his motion, Officer Lewis has submitted his affidavit in which he avers that he tried to keep the inmates who were chasing plaintiff out of the telephone room, but that, they were in the room, he took no further action believing that he himself was in danger. Officer Lewis further asserts that when the other inmates entered the room, Stubbs jumped through the plexiglass partition while the other inmates left by the door and followed him.

In support of his motion, Officer Dudley has submitted an affidavit in which he avers that upon being alerted that there was a disturbance on the evening of February 4, 1977, he went to the first floor and saw Stubbs in the hallway with over 30 other inmates, some of whom were armed with knives and sticks. He further asserts that he followed Stubbs down the hallway and unsuccessfully attempted to close the fire doors after him in order to contain the other inmates. He claims that at that

time, Stubbs was armed with a knife. Dudley also states that shortly thereafter he went to the aid of another officer and has no direct knowledge of what happened to Stubbs after that time. Finally, Dudley asserts that on February 11, 1977, he was a witness at Stubbs' first superintendent's proceeding because he believed that it was his duty to testify as to what had happened on February 4, 1977, including his belief that plaintiff was armed with a knife. Both defendants aver that they acted in good faith.

In opposition to the motions, plaintiff submitted his own affidavit and the affidavits of Reginald Gamble and Leroy Connelly who were inmates at Arthur Kill in February 1977 and allegedly witnessed the incident in question. Plaintiff has also submitted the affirmation of his attorney, Mr. Nevins. The affidavits of Gamble and Connelly identify Lewis as one of two officers who allegedly stood behind a wire screen and passively watched as the inmates attacked Stubbs. None of the affidavits state that Stubbs jumped through the plexiglass partition. The affidavits of Gamble and Connelly refer to an Officer "A" who allegedly locked a gate through which Stubbs might have escaped from the other inmates. Mr. Nevins, in his affidavit, avers that Dudley "may well have been" Officer A, and that the circumstances surrounding his admitted failure to close the fire-doors should be investigated in a deposition. Plaintiff's affidavit restates the facts alleged in his complaint and amended complaint. Additionally, the affidavit affirmatively states that Officer Dudley was the Officer "A": who allegedly locked the gate and ran away from the inmates. Plaintiff also contends that to his knowledge no officer was hurt during the incident.

Rule 56(c) unequivocally states that Court may not grant a motion for summary judgment unless the moving party successfully demonstrates that there exists no genuine issue as to any material fact and that, as a matter of law, he is entitled to relief. The burden rests on the moving party to demonstrate the lack of a genuine factual issue. Furthermore, in reviewing the record before it, the Court must resolve all ambiguities and inferences stemming from the facts in a light most favorable to the opposing party.

With these principles in mind, the Court must conclude that, in regard to the incidents which occurred on February 4, 1977, summary judgment in favor of defendants Lewis and Dudley is inappropriate because plaintiff has set forthe sufficient facts as to each defendant which are contested and material. Specifically, plaintiff identifies Officer Dudley as the officer "A" mentioned in his original complaint and presents a completely different version of Dudley's actions during the incident. Moreover, in regard to Lewis, plaintiff alleges that he allowed the other inmates to enter the telephone room then hid behind a partition and passively watched while plaintiff was beaten unconscious. This contradicts Lewis' claim that plaintiff jumped through the partition and was followed out into the hall by the other inmates.

These facts are material and prevent summary judgment because the application of the substantive law will turn on which set of facts is credited by the factfinder. The standard under which these officers' conduct is to be judged is whether through purposeful acts or deliberate indifference the defendants caused deprivation of plaintiff's rights. It cannot be decided whether defendants caused a deprivation of plaintiff's rights until a factual determination has been made as to what conduct actually occurred and whether it was purposeful and deliberate.

Moreover, for similar reasons, the Court must reject defendants' arguments that they are entitled to summary judgment on the basis of qualified good faith immunity. The Second Circuit recently held in *Pollnow v. Glennon, et al.*, that the test for qualified immunity is objective and there is no need for investigation into the subjective motives of the officials. However, summary judgment on the issue of qualified immunity will only be granted in cases where material facts are not in dispute. A state official is not immune if his conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. Again, this Court cannot rule as a matter of law that defendants' conduct did or did not violate plaintiff's rights when the conduct is a disputed question of fact. Consequently, as to the issues surrounding the February 4, 1977 incident, summary judgment must be denied.

However, the Court reaches the opposite conclusion as to defendant Dudley's participation as a witness in the superintendent's hearing. In *Briscoe v. Lattue* 460 U.S. 325 (1983), the Supreme Court recently held that a police officer who testifies at a judicial trial is immune from Section 1983 liability for his allegedly perjured testimony. The Court has also held that many of the immunities available to participants in a judgicial trial are available to participants in a quase-judicial administrative hearing. While the Second Circuit has not ruled on the applicability of witness immunity to administrative hearings, this Court believes that absolute immunity should protect an officer who performs an official function in a superintendent's hearing. Like a judicial proceeding, the function of the superintendent's hearing is to uncover the truth. Thus, an official who participates in the hearing should be given every encouragement to make full disclosure of all pertinent information within his knowledge. Since only complete immunity will provide that encouragement, the Court finds that Officer Dudley is absolutely immune from suit arising out of his allegedly perjured testimony at the hearing.

In closing, the Court notes that, for the reasons set forth in its oral opinion of April 26, 1985 granting summary judgment in favor of defendants Clements and Rufino, plaintiff's arguments regarding the prematurity of these motions and the preclusive effect of a prior motion for summary judgment are without merit.

For these reasons, the motion of defendant Lewis is DENIED in all respects and the motion of defendant Dudley is GRANTED with respect to issues surrounding his participation in the superintendent's hearing but DENIED in all other respects.

Settle an order on notice on or before May 17, 1985.

How close is this case for trial?

MS. BUTLER: Your Honor, I have just received request for representation yesterday on the issue of a party. I will be making a motion to dismiss with respect to that defendant within the next week.

I am not sure how soon after that Mr. Nevins will want to go to trial.

MR. NEVINS: I haven't received notice.

If—the only thing that I might do at this point would be to move now for judgment as to Dudley.

MS. BUTLER: I would very much object to hearing that application at this time because we haven't received notice from him, and on that basis I think we should have an opportunity to respond if he wants to make the application. But your Honor did last week deny any exemption—

THE COURT: Do I at this point have any status conference set or is there something before the Magistrate or anything like that.

MS. BUTLER: The Magistrate has said unless anybody came back to him by October 31st he would mark the case ready for trial.

THE COURT: That is the outside date, October 31st?

MS. BUTLER: As of 1984.

THE COURT: That was last year.

MS. BUTLER: Yes your Honor.

MR. NEVINS: In the meantime I didn't even have service. I just learned of service now—in the meantime, your Honor, I understand that even in July he had set an October 30th deadline. And certainly I am saying one of my difficulties was in getting service on the defendants. And first of all the Attorney General would not accept service. And secondly I had to wait to get processed on some of the people—

THE COURT: All right. I will put it down for July 12th.

Tony, you want to give me a time?

July 12th conference. I will put it down.

MR. NEVINS: In the meantime can I proceed—

THE COURT: In the meantime you do whatever you have to do.

(End of proceedings.)

APPENDIX E

ARTHUR KILL CORRECTIONAL
(Facility)

INMATE MISBEHAVIOR REPORT
TO SUPERINTENDENT

1) Name of Inmate Stubbs John No. 75A 3818 Cell C-6

2) Location of Incident C-Block Corr. Date 2/4/77 Time Appox: 7:24 p.m.

• • •

/s/ ROBERT DUDLEY — CO

Signature of Person Making Report — Title

Date: 2/9/77

• • •

TRANSCRIPT OF SUPERINTENDENT'S PROCEEDING
HELD ON FEBRUARY 4, 1977

SA4

* * *

Hoke: Did you explain charges 5&6? Alright just put your initials right here, just your initials. No no just J.S. thats your initials, John Stubbs. No no thats enough thats good enough, OK this time I tried to contact C.O. Dudley, the line is busy but I'll talk to him as part of the, as the actual arresting officer, and person who made out the report and he actually indicates here, as you well know, that the. It says here that you

* * *

SA 21

Hoke: OK You know I already advised you that I contacted Correction Officer Robert Dudley right

Stubbs: Who that, Who that?

Hoke: Robert Dudley the one who wrote this misbehavior report

Stubbs: Right, right, right

Hoke: and hear him so to speak in a conversation identify you as holding the knife

Stubbs: Right, right

ARTHUR KILL CORRECTIONAL
(Facility)

SUPERINTENDENT'S PROCEEDING RECORD SHEET
use typewriter or print clearly with ball point pen

* * *

1) Name of Inmate Stubbs, John No. 75A 3818 Cell C-6

4) Witnesses Interviewed

ROBERT DUDLEY	C.O.	WILLIAM SMITH	75A2424
Name	Title	Name	Title

* * *

TACONIC CORRECTIONAL FACILITY

TRANSCRIPT OF SUPERINTENDENT'S PROCEEDINGS
HELD ON INMATE JOHN STUBBS, 75-A-3818
ON JULY 28, 1977

Held By: A. L. Bayer, Dep. Supt/Adm.

Present: W. Radacinski, S.U. Correction Counselor

Witnesses: C.O. Dudley
C.O. Ranzer
Inmate U. McFarlan

* * *

MR. BAYER: This is Correction Officer Dudley (Robert), right?

C.O. DUDLEY: Correct.

MR. BAYER: All right. I'm going to have Mr. Radacinski, Correction Counselor, who is the staff representative for Mr. Stubbs sit in on this. You have any objection to that?

MR. DUDLEY: No, sir.

* * *

MR. BAYER: O.K. And of course we'll tape this so there won't be any problem about having a very fair hearing. Now, you don't have anything written in here right now do you?

C.O. DUDLEY: I don't know; my reports should be in. My report went in; I don't know if it's there.

MR. BAYER: Oh yes, here it is. This is the report we were, this is the report you put in at that time; approximately . . . well, first of all, this was the name of the inmate, the name of the inmate was John Stubbs.

C.O. DUDLEY: Correct.

MR. BAYER: O.K. And his number, which was 75-A-3818. Location of the incident, C-Block.

C.O. DUDLEY: Corridor.

MR. BAYER: Yeah, corridor. And the date was 2/4/77.

C.O. DUDLEY: Correct.

MR. BAYER: Approximately 7:28 PM.

C.O. DUDLEY: Correct.

MR. BAYER: According to your statement at that time there was 55 inmates working C-Block corridor.

C.O. DUDLEY: An approximation of (50).

MR. BAYER: Which you said 'appeared to be', right, yelling and in an argument with inmate Stubbs. Stubbs started walking up to C-Control, back towards C-Control. Other inmates were following, still yelling. Inmate Stubbs pulled out a knife, other inmates, the ones up front, pulled knives and started charging inmate. Inmates ran up C-corridor out into the Administrative corridor and into B-Block breaking phones, breaking desks and trying to assault inmate Stubbs. Inmate Stubbs violation of rules 1.16, 1.25 and 1.32. Is that the report you put out on . . . show it to you . . . is that the report you put in?

C.O. DUDLEY: Yes, it is.

MR. BAYER: O.K. What we're tying to ascertain here is the accuracy of the report and anything else you might have to embelish on this. One thing that's in my mind . . . did you actually see a knife in inmate Stubb's hand?

C.O. DUDLEY: Yes, sir.

MR. BAYER: You're positive?

C.O. DUDLEY: Yes, sir. I almost got cut with it.

MR. BAYER: I see. The other inmates had knives also, did you say?

C.O. DUDLEY: Yes, sir. See when inmate Stubbs was backing towards C-corridor, he had his back towards us cause we were in C-corridor. We was ordered to stand there cause there was a Sgt. Kish down there with the inmates when this was, you

know, happening and he ordered us to stay back where we was at. And so we stayed right there at C-Control and when he started backing up, and everything jumped off, we tried to, me and the other four officers, the other three officers, tried to grab Stubbs and pull him through the door while we still had about five seconds before the other inmates could get to him. If we could get him through the door and closed the door, we might have been able to get him out of there. And this is the only way that we could see stopping anything and I guess out of reflexes, when I grabbed Stubb's shoulder, you know, to take him to his cell, he swung back, you know, I assume just like anybody would if you grabbed me and I'm frightened, you know, I'm going to try to break loose especially when people come after me. That's when I almost got cut with the knife. So I know he had the knife.

MR. BAYER: It couldn't have been one of the other inmates with the knife?

C.O. DUDLEY: No, they were still back—they were back about maybe a good five or six feet from Stubbs. Cause, you see, when he started walking back up, they didn't immediately come at him, you know, they were still yelling, you know, you could see them still drifting towards him, alright? And he actually pulled a knife at that time. Then they said, 'no more messing inmate', and they started to charge. And, like I said we still had a few seconds, in my mind you know; I said we had a few seconds to get him through that door, maybe lock it or just hold it off cause the Administrative corridor wasn't too far—we could have got him through there and locked it up sealed them down there and had him up front. You know, this is what I thought that we could do. But it didn't materialize that way.

MR. BAYER: Do you know what caused the incident?

C.O. DUDLEY: No. I've heard rumors, uh, I've heard rumors such as . . . .

MR. BAYER: You don't know, right?

C.O. DUDLEY: No, i don't know exactly why it happened or anything.

MR. BAYER: Did inmate Stubbs precipitate the action or was he just trying to defend himself? Do you know what I'm driving at?

C.O. DUDLEY: Well, I would have to say that the man was actually defending himself. You know, I have to say that much. He was definiteiy defending himself because they were going to kill him. You know, the way they were coming at him and hitting him with two by fours and everything else, you know, broken desks, they would really try to do him in.

MR. BAYER: So actually, when he pulled the knife, it was to defend himself?

C.O. DUDLEY: Whether he pulled the knife to defend himself, he was the first one to pull a weapon.

MR. BAYER: You say he was the first one to pull a weapon?

C.O. DUDLEY: I say he was the first one to pull a weapon, unless there was some inmates in the back of the men up front that I couldn't see that he might have seen with a weapon, cause he was right there and I was a few feet . . . you know, I was in the control. But from where I was at, he was the first one to pull a weapon.

MR. BAYER: All right. In view of this, would you say that he, in this charge he has on, where I said 'disturbance, creation', he was really participating in disturbance rather than creating a disturbance?

C.O. DUDLEY: Truthfully, I would say he participated in it rather than, more or less, create it because again, they confronted him in C-corridor.

MR. BAYER: And the second charge of dangerous weapons—and this one, you explained it, you did see a knife. The charge said that 'in the corridor near C-Control stating you did pull out a knife from the left side of your person, to wit, from your trousers'—would you say that was accurate or would you say that this is a . . .

C.O. DUDLEY: No, it's not an assumption; it's very accurate cause as he was backing up towards us, he was coming back

towards me, he went with his right hand toward his left side and when his hand came back around he had the knife in his hand.

MR. BAYER: Now you're sure it's a knife?

C.O. DUDLEY: Yes, sir.

MR. BAYER: Now, the last charge is attempted assault. 'After pulling the knife from your trousers, you brandished the knife toward the oncoming inmates'. That, in your view . . .

C.O. DUDLEY: That was just defense; that was to keep them off which I must say he did a very good job too, for a long time. You know, that was just to keep them from, you know, just actually plopping right down on top of him. And, up until the time that the chairs was broken as they came from C-corridor and they started throwing things at him, he kept them back, away from us. He was backing on out.

MR. BAYER: Now, they said there were approximately 50—you don't remember, 50-55 inmates. Were any of the other inmates charged with anything? Did you find . . .

C.O. DUDLEY: I don't know. Truthfully speaking, I don't know.

MR. BAYER: As far as—well, we can ascertain out of this that you were there. How far away were you from the incident say, roughly, when it occurred?

C.O. DUDLEY: When it first occurred, when they first had him down in the corridor, when they were arguing with him, it had to be about no more than 25 feet from him.

MR. BAYER: And you said there were other officers there.

C.O. DUDLEY: Right. There were three other officers there with me.

MR. BAYER: Who were they?

C.O. DUDLEY: They were Officer Marty Ranzer, Officer Trapani and Officer Comminetti.

MR. BAYER: O.K. Thank you very much.

C.O. DUDLEY: O.K.

* * *

MR. BAYER: You're Martin Ranzer; you are a Correction Officer?

C.O. RANZER: I am.

MR. BAYER: And, as a matter of fact, I do know you from Taconic.

C.O. RANZER: That's true.

MR. BAYER: All right. I have Mr. Radacinski sitting in on this part because I want Mr. Stubbs to have as fair a hearing as possible. Do you have any objections?

C.O. RANZER: No. I have no objections.

MR. BAYER: Now I have here . . I don't have a statement from you, or do I?

C.O. RANZER: No, you don't.

MR. BAYER: O.K. I have read Mr. Dudley's statement and if I read it back for you to recall and see if there are any corrections or omissions, or something else in his misbehavior statement stated that John Stubbs, was involved . . . he was the inmate and his number was 75-A-3818, and it happened on C-Block corridor on 2/4/77 at approximately 7:28 PM.

C.O. RANZER: That's correct.

* * *

INMATE STUBBS: How do I know there were witnesses?

MR. BAYER: You will know who the witnesses were; I can even tell you at this time. They were C.O. Dudley, C.O. Martin Ranzer and inmate Uzell McFarlan.

* * *

MR. BAYER: Charge 2—violation of N.Y.S. Standards of Inmate Behavior Rule 1.32, Dangerous weapons, firearms, ammunition, bombs, batons, blackjacks, knives or any dangerous item. There was sufficient evidence from the two Correction Officers involved to indicate that you did indeed have a

knife. While there might have been contradiction as to where the knife was concealed (in the case of C.O. Dudley, he stated in your trousers, while C.O. Ranzer claims it was in your sleeve), both were not in a position to actually see where the knife was concealed since your back was turned to them. However, C.O. Dudley states at one point he was nearly slashed by the knife held by you; while agreeing that you did not in any way attempt to hurt the Correction Officer, nevertheless, that was evidence that a weapon existed.

* * *

TACONIC CORRECTIONAL
(Facility)

SUPERINTENDENT'S PROCEEDING
RECORD SHEET

1) Name of Inmate Stubbs, John No. 75A 3818 Cell C-6

* * *

4) Witnesses Interviewed

CO Robert Dudley	Corr. Officer	Martin Ranzer	Corr. Officer
Name	Title	Name	Title

* * *

TACONIC CORRECTIONAL FACILITY SA 50
(Facility)

SUPERINTENDENT'S PROCEEDING

1) Name of Inmate John Stubbs No. 75A 3818
2) Date of Disposition of Charge: 7/29/77

* * *

5. Summary of Evidence: 1 Misbehavior report by C.O. Robert Dudley, dated 2/9/77.

* * *

OPPOSITION BRIEF

ORIGINAL

No. 88-975

Supreme Court, U.S.
FILED
DEC 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROBERT DUDLEY,

Petitioner,

-against-

JOHN STUBBS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR G. NEVINS, JR.
Attorney for Respondent
JOHN STUBBS
225 Broadway
New York, New York 10007
(212) 406-2062

QUESTIONS PRESENTED

1. The Whitley v. Albers, 475 U.S. 312 (1986) decision applies to situations where there are competing institutional interests in providing a safe and secure prison environment, and where a prison official must be accorded some flexibility of action and discretion when directly enforcing prison rules and regulations. The failure of the correction officer to protect one inmate from violence and physical harm from other inmates is still judged against the 'deliberate indifference' standard, properly charged to the jury.

2. Did the Petitioner - defendant waive argument on the issue of statute of limitations and relation back and/or qualified immunity by it's failure to cross appeal?

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Rules

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REASONS FOR DENYING THE PETITION

A. THE WHITLEY DECISION DOES NOT CHANGE ESTABLISHED LAW IN THE CIRCUMSTANCES OF THE CASE AT BAR

The Petitioner attempts to convince this Court to grant his Petition for Certiorari, claiming that there is a conflict among Courts of Appeals as to the application of a 'heightened standard' for liability under the Eighth Amendment as ennunciated in Whitley v.Albers, 475 U.S. at 320. This is a totally misleading proposition.

A close scrutiny of the applicable case law indicates there is no such conflict among Courts of Appeals decisions regarding cases with factual circumstances similar to the case at bar: ie. a correction officer's duty to protect a prisoner from harm from other prisoners. The 'heightened standard' for liability has not been applied to these factual circumstances. A review of case law indicates that the Whitley standard is only applicable 'where physical force is directly applied by prison officials to maintain security or discipline'. Pressly v. Hutto, 816 Fd 2d 977, 979, 4th Circ., (1987). The deliberate or callous indifference standard is consistently used to evaluate the conduct of a correction officer who has reason to know of a probable risk of harm to an inmate.

Whitley is simply the crystallization of a long line of

decisions that involve a prisoner's Eighth Amendment claim against prison officials for use of excessive force and 'cruel and unusual punishment' during the course of enforcing discipline and exacting punishment directly against the claimant or as part of their general duties to promote prison security and enforce prison rules. In each of these cases, the claim of the plaintiff stems from injuries or damages resulting from actions of prison officials, "making or carrying out decisions involving the use of force to restore order in the face of prison disturbance", Whitley v. Albers, 106 S.Ct at 1084, or using force more directly against the plaintiff prisoner himself in the course of enforcing discipline and rules. Corselli v. Coughlin, 842 F.2d 23, 2nd Cir. (1988); Holloway v. Lockhart, 813 F.2d 874, 8th Cir. (1987); Ort v. White, 813 F.2d 318, 11th Cir. (1987); Brown v. Smith, 813 F.2d 1187, 11th Cir. (1987); Hines v. Boothe, 841 F.2d 623, 5th Cir. (1988); Anthony v. Lynaugh, 833 F.2d 1007, 5th Cir. (1987); James v. Alfred, 835 F.2d 605 5th Cir., Cert. denied, 108 S.Ct. 1599, (1988); Stevens v. Corbell, 832 F.2d 884, 5th Cir. (1987) Cert. denied, 108 S.Ct. 2018 (1988); Justice v. Dennis, 834 F.2d 380 4th Cir (1987); Vaughan v. Ricketts, 859 F.2d 736, 9th Cir. (1988); Christianson v. Kincheloe; 857 F.2d 1477 9th Cir. (1988); Arroyo v. Schaefer, 548 F 2d. 47 (1977) 2nd Cir., Johnson v. Glick, 481 F 2d. 1028 (1973), 2nd Cir.; Dell Fargo v. San Juan Bautista, 857 F.2d 638 9th Cir. (1988); Foulds v. Corley, 833 F 2d. 52 5th Cir. (1987); O'Neill v. Krzeminski, 839 F 2d 9, 2nd Cir. (1988).

In all these cases, the Court was forced to reach a balance between the civil rights of prisoners to be protected from unnecessary or excessive harm while he and/or other prisoners were being disciplined or punished on the one hand, and the perogatives and obligations of prison officials to be free to use their discretion to carry out their duties to maintain prison security and safety, and generally enforce and obtain compliance with prison rules and regulations on the other hand. The Supreme Court has referred to these duties as 'competing institutional concerns' in Whitley v. Albers, 106 S.Ct. at 1084. This is not necessarily a higher standard, but one that acknowledges the duties and obligations of prison officials in circumstances where there are "equally important governmental responsibilities". Whitley, supra.

The distinction between the "Whitley standard" and the "deliberate indifference" standard was most succinctly set forth by retired U.S. Supreme Court Justice Powell, sitting by designation on the 4th Circuit in LaFaut v. Smith, 834 F.2d 389 (4th Cir. 1987) at Page 391:

> "A similar view of the Eighth Amendment led the Supreme Court in Estelle v. Gamble to require a plaintiff to establish that the defendant's conduct was motivated by 'deliberate indifference'. id. Although in Whitley v. Albers the Court held that the 'deliberate indifference' standard does not adequately capture the importance of the competing obligations that exist in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, id 106 S.Ct. at 1085, the instant case does not involve such concerns. Whether one characterizes the treatment

> received by LaFaut as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in Estelle to this case. In the context of this case there is no clash between LaFaut's punishment and 'equally important governmental responsibilities'".
>
> (Emphasis added).

The Whitley decision, however, did not and has not disturbed the long settled case law involving factual circumstances which present the question of a prison official's constitutional obligation to protect a prisoner from harm from other inmates, or from harm in general, directly resulting from the prison official's 'deliberate indifference to' or 'callous disregard of' a prisoner's health and safetly. The standard by which our case law measures the conduct - malfeasance or non feasance - of the prison official under these circumstances has long been 'deliberate indifference', 'callous disregard', 'intentional or reckless conduct endangering the health or safetly of the inmate - more than mere negligence, but short of express or malicious sadistic intent.

These cases present factual situations where the mission, purpose, act or failure to act of the prison official is not directed at discipline or punishment or enforcement of prison rules and security upon plaintiff inmate or inmates generally, but is rather a callous failure to fulfill his responsibilities to protect the physical well being of the inmate. The deliberate indifference standard is applied by the Court, and

rightfully so, where the injured or complaining inmate has not waived his constitutional rights by causing, participating in, or creating a disturbance requiring disciplinary action on the part of prison officials.

The rationale behind the somewhat less exacting standard in these cases is obvious. By virtue of his very confinement in the prison, the prisoner is deprived of the means to properly protect, care for, or look out for himself, and sometimes it is the environment of the prison itself which creates a danger and risk of harm. These circumstances trigger the duty and obligation of prison officials to protect the rights of the 'innocent victim'. While mere negligence or the reasonable 'man' standard is not imposed on prison officials, the Eighth Amendment and Fourteenth Amendment embody "broad and idealistic concepts of dignity, civilized standards, humanity and decency". Jackson v. Bishop, 404 F 2d. 571, 578 C.A.8, (1968); "against which we must evaluate penal measures" ; Estelle v. Gamble, 479 U.S. 97 (1976) 50 LE d 2d 251, 97 S.Ct. 285.

These principles have been repeatedly and consistently recognized where an inmate alleges that he was injured or damaged due to a deliberate or reckless indifference, or callous disregard to his safety and welfare by prison officials. Most often, as in the case of respondent John Stubbs, this situation arises when prison officials have failed in their duty to protect individual prisoners from physical harm from other inmates.

The following cases embody these long standing principles:

Curtis v. Everett, (1973) 3rd Cir. 489 F 2d. 516 Cert.denied Sub nom; Smith v. Curtis, 416 U.S. 995, 94 S. Ct. 2409, 40 Lawyers Edition 2nd 774, (1974) (decision reversed District Court dismissal of complaint holding prisoner's complaint stated cause of action under Civil Rights Act based on violation of the due process clause of the Fourteenth Amendment, where defendant Corrections Officer failed to stop attack on plaintiff by other inmates); Williams v. Vincent, 508 F.2d 541 (1974) 2nd Cir., (Court of Appeals reversed District Court dismissal of complaint where allegation was that Corrections Officer jumped back when he suddenly perceived danger to himself and plaintiff Williams from another inmate - Court of Appeals held Williams should have opportunity to prove deliberate indifference - (prior cases quoted in note 11 Page 546); Ayers v. Coughlin, 1985, 780 F.2d, 205 2nd Cir. (Court of Appeals reversed dismissal of complaint on issue of whether correction officer acted intentionally or with reckless disregard of inmate's right to be free from risk of harm from fellow prisoners under the Eighth Amendment and Due Process Clause); Bass v. Jackson, 790 F.2d 760 2nd Cir. 1986 - Court of Appeals reversed District Court dismissal, holding allegations were sufficient against two Corrections Officers for failure to protect plaintiff from ammonia thrown in his face by other inmates; Berg v. Kincheloe, 794 F 2d. 457 9th Cir. (1986) - Court of Appeals reversed District Court dismissal of case against two corrections officers, using the deliberate indifference standard of Section 1983 and the Eighth and Fourteenth Amendments; Pressly

v. Hutto, 816 F 2d. 977, 4th Cir. (1977) - Court of Appeals reversed dismissal against sergeant correction officer who failed to protect inmate from attack by another inmate, using deliberate indifference standard rather than wantonness standard of Whitley, which was applicable only where physical force was applied directly by prison officials to maintain security or discipline; Merriweather v. Faulkner, 7th Cir. (1987) 821 F.2d 408, Cert denied, 108 S.Ct. 311 - Court of Appeals reverses dismissal of plaintiff's Eighth Amendment claim for denial of medical treatment for transexual and failure to protect him from assaults by other inmates; Ruefly v. Landon, 4th Cir. (1987) 825 F.2d 792, Court of Appeals affirms District Court dismissal of Eighth Amendment claim for damages and injuries received from assault by other inmate, because of failure to allege deliberate indifference 'to specific known reason for harm to assaulted inmate'; Campbell v. Greer, 7th Cir. (1987) 831 F.2d 700 - Court of Appeals affirmed a District Court jury verdict for corrections officers, stating that the deliberate indifference jury instruction correctly reflected that more than mere negligence was required for liability under the Eighth Amendment; Blankenship v. Meachem, 840 F.2d 741 10th Cir. (1988) - Court of Appeals affirmed District Court dismissal of complaint of Eighth Amendment violations stating that plaintiff had not shown more than inadvertance or a good faith error by defendants. While the Court of Appeals quoted the Whitley obduracy and wantonness standard, it also quoted from the Merriweather standard of

deliberate indifference, supra. Harris v. Maynard, 10th Cir. 1988 843 F 2d., 414 - Court of Appeals affirms District Court's dismissal of defendants' motion for summary judgment and protective order where inmate was murdered by other inmates after mother requested and received protective order. Court contended that standard is 'wanton and obdurate disregard of, or deliberate indifference to' (emphasis added) prisoner's right to life as a condition of confinement is a substantive constitutional deprivation, whether it falls under the due process clause or the Eighth Amendment; Cortes-Quinones v. Jiminez - Nettleship, 1st Cir. (1988) 842 D 2d 556, Cert denied 109 S.Ct. 68 (1988) - Court of Appeals held evidence was sufficient to support District Court finding that prison officials were 'deliberately indifferent' to health and safety needs of psychiatrically disturbed inmate in overcrowded jail; Morales v. Coughlin, 2nd Cir. Docket No. 87-2092, New York Law Journal, April 4, 1988 - Court of Appeals restored dismissal of action for corrections officers' ignoring attack of one inmate upon another, remanded for factual determination of deliberate indifference standard.

There is, of course, a third distinct line of decisions where the Courts have found that either the pleadings or the evidence fail to substantiate anything other than mere negligence against prison officials. Daniels v. Williams, 106 S.Ct. 662 (1986) - inmate slipped on pillow negligently left on stairway by correction deputy; Davidson v. Cannon, 106 S.Ct 668 (1986) District Court bench trial was reversed by Court of Appeals, and

Court of Appeals was affirmed by Supreme Court, stating that the protection of the Due Process clauses of the Eighth and Fourteenth Amendments 'are not triggered by a mere lack of due care by prison officials'. District Court specifically found that defendants did not act with deliberate or callous indifference to the prisoner's needs, but that they negligently failed to protect him from another inmate.

B. THE EVIDENCE PRESENTED WAS MORE THAN SUFFICIENT TO UPHOLD THE JURY VERDICT.

Respondent, John Stubbs, came to New York State from North Carolina with his Mother, a housecleaner, when he was fourteen years of age. After coming to New York, he never attended school. He could not read and could only write his name. By February 4, 1977, the day of this incident, he had already served a little more than one year at Arthur Kill Correctional Facility in Staten Island, New York, for robbery. (Pages 24 through 27). Stubbs had a pass to leave the prison building so he could work on a backhoe moving snow. (See Pages 27 through 28).

On February 4, 1977, Stubbs returned from work outside the grounds, knowing nothing about a sit down strike. (Pages 28-36). He had dinner, took a bath, and played some checkers and cards. Sometime between 7:00 and 8:00 p.m., he was going to make a phone call to his mother when he was stopped by a group of Muslems, who complained that Stubbs had been bringing pork into his living unit from the kitchen. (Pages 36 through 40). He was assaulted by the Muslems, and this began the chase that caused

John Stubbs to run to the administration door and plead to be let through to safety by Corrections Officer Dudley. Dudley let himself and another Corrections Officer through the door, and closed the door on Stubbs. Dudley testified, under subpoena, on direct examination that he had observed a number of Muslem inmates and Stubbs get into an altercation and saw the Muslems begin chasing and attacking Mr. Stubbs. As Dudley described it, he observed the altercation begin, and he observed the inmates attacking Stubbs as the group moved down 'C' corridor to the main corridor. (Pages 250 to 264). At this point, Dudley's testimony varies from that of Stubbs, C.O.'s Trapani and Caminetti. Stubbs claims he observed Dudley at the Administration Door, called for help and ran to the door asking to be let through, but Dudley went through the door, closed it and locked it on Stubbs. Dudley claimed he never went through the door, but tried to help his falling comrade (Caminetti) at the Administration door after Stubbs ran to the phone room. Caminetti claims he was trying to pull Stubbs through the closed Administration door when he slipped to the ground, and no corrections officers tried to help him. Corrections Officer Trapani claimed he did not see what went on at the Administration Door, but testified that it would have been proper to have let Stubbs through the door, to save his life. Dudley and an expert witness, Filian, claimed that it would not have been proper to let Stubbs through the Administration door for security reasons. This position was obviously contradicted by Caminetti, who claimed he tried to get

Stubbs through the door, and Trapani, who told the jury on cross examination, that taking Stubbs through the Administration door would have been proper. In light of this testimony, the jury evidently rejected the defendant's attempt to fit this case into a Whitley scenario.

The jury no doubt rejected the testimony of Dudley and Filian, and chose to beleive Stubbs, Caminetti, Trapani and Lewis. The jury simply did not beleive defendant's attempt to conceal his callous disregard for and his deliberate indifference to Stubbs' welfare in the cloak of prison security policy. This was the perogative of the fact finders, not the Magistrate.

C. THE JURY CHARGES WERE PROPER FOR THE CIRCUMSTANCES OF THE CASE.

Nowhere has petitioner Dudley argued that the Magistrate's jury charges were incorrect. That was certainly not an element of the Magistrate's decision. The Court of Appeals reviewed the Magistrate's instructions and found them without fault. It is difficult to understand how Magistrate Caden could hold that while deliberate indifference was the proper constitutional standard, properly charged to the jury, something more than deliberate indifference was required to uphold the jury's verdict. The verdict was not excessive. It was not the result of passion or prejudice. The jury was carefully guided by the Magistrate's instructions and ultimately distinguished between the conduct of Lewis and the conduct of Dudley.

The jury carefully sorted out and weighed the evidence and

weighed credibility of witnesses. The Magistrate was not justified in substituting his interpretation of the facts for that of the jury. Baskin v. Hawley, 807 F 2d. 1120, 2nd Cir. (1986).

D **THE COURTS BELOW MADE NO ERROR AS TO THE STATUTE OF LIMITATIONS OR RELATION BACK.**

Petitioner Dudley never filed a Cross Appeal of both the rulings of District Court Judge Bramwell and Magistrate Caden, allowing service on Defendant Dudley under the relation back doctrine under F.R.C.P. 15(c). While plaintiff-appellant Stubbs did not brief these issues for the Court of Appeals, Judge Jon Newman nevertheless stated in his decision:

> 'We have considered appellee's alternative arguments for dismissal on statute of limitations and qualified immunity grounds, and agree with Judge Bramwell and Magistrate Caden that they are without merit'.

It is respondent's position at this juncture that defendant petitioner Dudley's failure to file a Cross Appeal on these issues is fatal to any argument they may make on statute of limiations and qualified immunity before the Supreme Court. Peoria and Pekin Union Railway v. U.S., 1924 263 U.S. 528, 44 S.Ct. 194, 68 Lawyers' Edition 427; Alaska Industrial Board v. Chugach Electric Association, (1957) 356 U.S. 370, 324 - 325, 78 S.Ct 735, 738, 2 Lawyers Edition 2nd, 795; Robicheaux v. Radcliffe Material Inc., C.A. 5, (1983) 697 F 2d. 662.

Petitioner's contention regarding relation back is ill founded in any event. If there were ever a case where the

relation back doctrine should be applied this is this case - where John Stubbs was illiterate, was in prison and in solitary confinement for an extended period after the incident, was never faced with his accuser in person at any subsequent Superintendant's Hearing, and was soon thereafter transferred to another prison facility. To the extent that he had legal counsel, such counsel was forced to conduct the litigation at great distance and great inconvenience, and never obtained adequate discovery. Officer 'A' was named in the original, timely served and filed complaint, and his actions were described in the complaint with particularity.

A number of other Corrections Officers were named, along with Superintendant Robert McClay, whose duty it should have been to thoroughly investigate the entire incident.

The petitioner finds himself in the uncomfortable position of claiming that Dudley, who we know testified against Stubbs at two subsequent hearings, and his superiors, and his attorneys, could not have known that he was the named officer 'A' in the complaint while Stubbs, who was never allowed to confront Dudley in person, and who could not read, must or should have known of Dudley's name and identification.

Defendant's reliance upon Schiavone v. Fortune, 106 S.Ct. 2379, (1986) is both misplaced and intentionally misleading. The Supreme Court, in an affirmation of the District Court decision, (Sarokin, J.) turned on the important fact that 'neither Fortune nor Time, received notice of the filing until after the

limitations period had run, and thus there was no proper notice to Fortune that could be imputed to Time. (Pages 2383 through 2384).

Kilkenny v. Arco Marine, Inc. 800 F 2d. 853 9th Cir. (1986) is also innapposite, in that the basis for the Court of Appeals' affirmation of the District Court's refusal to apply the relation back doctrine was the fact that the originally named defendant had supplied plaintiff with the names of the proper and indispensable parties long before the statute of limitations had run. The State of New York, in the instant case, was not nearly as forthcoming.

E. THERE IS NO SUBSTANCE TO THE PETITIONER'S CLAIM OF QUALIFIED IMMUNITY.

Respondent repeats his position that petitioner may not now argue the qualified immunity defense previously decided by Judge Bramwell, Magistrate Caden, and the Court of Appeals for the Second Circuit, for his failure to file a Cross Appeal. The argument is, nonetheless, invalid. As of 1977 there were numerous District Court decisions reiterating the constitutional obligations of Corrections Officers to protect an inmate from violent attack by other inmates.

Curtis v. Everett, 489 F 2d 516 (1973); Howell v. Cataldi, 464 F 2d 272 3rd Cir. (1972); Basista v. Weir, 340 F 2d 74, 3rd Cir. (1965); Johnson v. Glick, 481 F.2d 1028, 2nd Cir. (1973); Kisch v. County of Milwalkee, 441 F.2d 901 7th Cir. (1971); Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 Lawyers

Edition, 183, (1952); Grey v. Creamer, 465 F.2d 179 3rd Cir. (1972); Williams v. Field, 416 F 2d 483 9th Cir. (1969).

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
December 24, 1988

Respectfully submitted,

ARTHUR G. NEVINS, JR.
Attorney for Respondent
John Stubbs

No. 88-975

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROBERT DUDLEY,

Petitioner,

-against-

JOHN STUBBS,

Respondent.

PROOF OF SERVICE

ARTHUR G. NEVINS, JR., after being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court he served the within Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for The Second Circuit on counsel for the Petitioner by enclosing two copies thereof in an envelope, first class postage pre-paid, addressed to:

Robert Abrams
Attorney General of the
State of New York
120 Broadway
New York, N.Y. 10271
Attn: Barbara B. Butler, AAG.

and depositing same in the United States Mails at 225 Broadway, New York, New York, on December, 1988.

ARTHUR G. NEVINS, JR.

Subscribed and sworn to before me
this 27th day of December, 1988

THOMAS S. PAIKOS
Notary Public, State of New York
No. 41-8292130
Qualified in Queens County
Certificate filed in New York County
Commission Expires June 30, 1990

OPINION

SUPREME COURT OF THE UNITED STATES

ROBERT DUDLEY *v.* JOHN STUBBS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88-975. Decided February 21, 1989

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, and JUSTICE KENNEDY join, dissenting from the denial of certiorari.

Because the judgment below rests upon a fundamental misconception of this Court's decision in *Whitley* v. *Albers*, 475 U. S. 312 (1986), and conflicts with the approach taken by the vast majority of the Courts of Appeals, including a prior decision of Second Circuit itself, I would grant the petition for certiorari. Under the decision which the Court declines to review today, prison officials are essentially held strictly liable under the Eighth Amendment for split-second decisions made in the face of serious threats to the security of the prison facility. This is precisely the result that our decision in *Whitley* was designed to avoid.

I

On February 4, 1977, the Arthur Kill Correctional Facility was the site of an institution-wide sit-down strike orchestrated and controlled by a group of prisoners known as the "Muslims." That evening, as respondent, John Stubbs, an inmate at the institution, was walking down the main corridor of C control area of the prison to make a telephone call, he was confronted by a gang of 20 to 30 Muslim prisoners. The gang was armed with homemade knives up to 16 inches in length as well as other weapons wrapped in sheets. The

mob began to chase respondent through the corridors of the prison, throwing garbage cans and table legs down the hallways. As respondent ran toward the telephone room, he noticed petitioner, Robert Dudley, and another guard standing in front of a door leading to the administrative control center of the prison. Neither Officer Dudley, nor the correctional officer with him had a firearm, a baton, or a two-way radio. The prison arsenal, the offices of the prison superintendent, and the prison hospital are all accessible from the administration corridor.

When respondent approached the door to the administration area with the armed mob directly behind him, Officer Dudley and the other corrections officer entered the administration corridor and secured the door from the other side. Officer Dudley refused to open the door to the administration corridor, despite the entreaties of respondent. Respondent then ran down another corridor and jumped over the counter of the telephone room and cried for help. The correctional officers in the telephone room, and one inmate present there, immediately removed themselves to positions of safety. At this point the angry mob caught up with respondent and beat him severely.

Respondent brought this action under 42 U. S. C. § 1983 against petitioner and other corrections officials, alleging that the failure to aid him during the disturbance constituted a violation of his Eighth Amendment rights. The case was tried to a jury before a Magistrate. Officer Dudley testified that he did not open the administration door because he never had the chance to, but indicated that he would not have done so in any event, given the fact that the prison arsenal and the superintendent's office lay on the other side. As he put it at trial, "there is no way you are to allow inmates to go up into that area, especially in that type of situation." Pet. for Cert. 5. In addition, there was expert testimony at trial that Officer Dudley had followed proper procedure in securing the administration corridor door. At the close of the evidence, petitioner asked for an instruction to the jury that his conduct must have been "malicious and sadistic" to support Eighth Amendment liability under this Court's decision in *Whitley* v. *Albers*, *supra*. The trial court rejected petitioner's proposed instruction and instead delivered a "deliberate indifference" charge. The jury returned a verdict against Officer Dudley in the amount of $26,000 for alleged violations of respondent's Eighth Amendment rights.

The Magistrate subsequently granted petitioner's motion for a judgment notwithstanding the verdict. The Magistrate found this case "akin" to the situation presented in *Whitley*, and emphasized that "'prison administrators . . . should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" App. to Pet. for Cert. 5b, quoting *Whitley*, *supra*, at 321–322 (citation omitted). The Magistrate cited three factors which justified the entry of judgment for petitioner. First, "there was a serious threat to prison security at the time Stubbs sought Dudley's protection." App. to Pet. for Cert. 7b. Second, "Dudley acted without ill will or malice," and third, "prior to the attack upon Stubbs, Dudley had no knowledge of either a threat to Stubbs' life, or the possibility that Stubbs would be attacked." *Ibid.* The Magistrate concluded that, "[g]iven the exigent circumstances, it is obvious that Dudley acted quickly to respond to the dangerous situation with which he was confronted. His failure to take into account Stubbs' welfare may have been unfortunate but it cannot fairly be characterized as deliberately indifferent." *Id.*, at 9b.

The Court of Appeals for the Second Circuit reversed the judgment for petitioner and reinstated the jury's verdict. 849 F. 2d 83 (CA2 1988). The crux of the lower court's holding in this case is contained in the following passage:

> "*Whitley* involved a full-blown prison riot. In the present case the condition creating the 'prison disturbance'

> was the Stubbs incident itself: twenty or more angry prisoners wanted to hurt one prisoner. The issue put to the jury was whether the defendant corrections officers acted unconstitutionally in allowing them to do so. The only 'competing institutional concern[ ]' in this context was whether the defendants, by aiding Stubbs, might plausibly put prison security (or their own safety) at risk. This was for the jury to decide under the 'deliberate indifference' standard." *Id.*, at 86 (footnote omitted).

The Court of Appeals noted that there was evidence that the prison's Muslim population had engaged in a "sit down strike" on the day of the incident, but found that "the situation apparently created no unusual threat to prison security." *Id.*, at 86, n. 3.

In *Whitley* this Court analyzed the dictates of the Eighth Amendment in the context of a prison disturbance that involved the taking of a correctional officer as a hostage. In response to the hostage taking, prison officials determined that forceful intervention was necessary to protect the life of the hostage and the safety of the prisoners not connected with the riot. During the assault on a barricade erected by the prisoners holding the hostage, a prisoner was hit in the knee by a shotgun blast. The prisoner brought a § 1983 action against prison officials, claiming violation of his Eighth Amendment rights. The District Court directed a verdict for the prison officials, finding that the use of deadly force was justified "under the unique circumstances of this case." 475 U. S., at 317. The Court of Appeals reversed, finding that because the prison riot was subsiding at the time the rescue plan was carried out, a reasonable jury could find that the use of force entailed a "deliberate indifference" to the injured prisoner's Eighth Amendment rights. *Id.*, at 318.

This Court reversed, noting that the "deliberate indifference" standard of *Estelle* v. *Gamble*, 429 U. S. 97 (1976), "was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." *Whitley*, 375 U. S., at 320. The Court found that the balance must be struck differently where prison security and the safety of both prison officials and inmates is threatened. "In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Ibid.* Accordingly, the Court set out the following test to be applied in such cases:

> "Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.*, at 320–321 (citation omitted).

The Court indicated that the standard it enunciated applied to "prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline." *Id.*, at 322. Decisions made "in bad faith or for no legitimate purpose" are not insulated from review, but judge and jury may not substitute their judgment as to the reasonableness of the action taken by prison officials. Unless an inference of wanton and sadistic infliction of pain arises from the facts as pled, "the case should not go to the jury." *Ibid.*

The Court of Appeals' determination that "deliberate indifference" was the correct Eighth Amendment standard under which to assess the correctional officer's action in this case is directly contrary to our decision in *Whitley*. The court's opinion acknowledges that the very kind of "competing institutional concerns" present in *Whitley* were present here, but

then goes on to find that the deliberate indifference standard was appropriate. The situation here was arguably *more* dangerous than in *Whitley*, where, although a hostage had been taken, the situation had stabilized and the correction officials had time to plan a course of action. Here a split-second decision had to be made. A single door stood between armed prisoners, who had engaged in a sit-in earlier in the day, and the prison arsenal and the office of the prison superintendent. Application of the deliberate indifference standard in a setting like this one essentially renders prison officials strictly liable for putting the security of the prison and the lives of *all* its inhabitants before the physical security of one inmate. In this case, if Officer Dudley had attempted to aid respondent by opening the door, and tragedy had ensued, he would no doubt have been subject to disciplinary action by his superiors, not to mention state-law tort liability for any ensuing injuries caused by his decision.

The judgment here also conflicts with the decision of another panel of the Second Circuit which held that the *Whitley* standard applied to a correctional officer's use of force in the face of an explosive situation created by a prisoner's use of racial slurs in a crowded cafeteria and his subsequent resistance to orders to leave the scene. See *Corselli* v. *Coughlin*, 842 F. 2d 23, 26 (CA2 1988) ("*Whitley* is distinguishable on the facts, since that case involved a full-scale prison riot and the incident here was far from that. Nevertheless, the test under *Whitley* applies . . ."). Moreover, no other Court of Appeals has interpreted *Whitley* as limited to "full-blown prison riots," and it is clear that this case would have been decided differently in other Circuits in the country. See, *e. g.*, *Hines* v. *Boothe*, 841 F. 2d 623, 625 (CA5 1988) (applying *Whitley* where single prisoner resisted order to return to his cell); *Holloway* v. *Lockhart*, 813 F. 2d 874, 879 (CA8 1987) (applying *Whitley* standard to use of tear-gas to end occupation of prison day room); *Ort* v. *White*, 813 F. 2d 318, 323 (CA11 1987) ("Although *Whitley* was decided in the the extremely volatile context of a prison riot, its reasoning may be applied to other prison situations requiring immediate coercive action").

II

While the resources of this Court are scarce, and the judgment the Court declines to review today is aberrational enough that correction within the Second Circuit appears likely, in my view the great potential for disruption of prison security engendered by the judgment of the Court of Appeals in this case merits the strong medicine of summary reversal. There are 64 state-run correctional institutions within the jurisdiction of the Second Circuit with a total prison population of over 40,000 inmates. U. S. Dept. of Justice, Sourcebook of Criminal Justice Statistics—1987, pp. 449, 493 (1988). The Federal Government runs five correctional institutions within the same geographic region, housing almost 4,000 federal detainees. U. S. Dept. of Justice, Federal Prison System, Monday Morning Highlights, Jan. 23, 1989. In all of these institutions, prison officials and correctional officers must now choose between their sworn duty to maintain the security of the institution and the dictates of the Eighth Amendment as interpreted by the Second Circuit. Because nothing in the Constitution creates such a Hobson's choice, and because this Court has explicitly so held in *Whitley*, I would grant the petition for certiorari and reverse the judgment below. I respectfully dissent.